87-103

Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PIERRE BOULEZ,

Petitioner,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

1. May one statutory delegate of the Secretary of the Treasury disavow a compromise under I.R.C. sec. 7122(a) of a disputed claim of income tax liability, made orally by another statutory delegate, where I.R.C. sec. 7122(a) (unlike a companion section, I.R.C. sec. 7121[a]) does not require a writing.

The Circuit Court did not answer the question. While conceding that Congress deleted from a draft predecessor provision of I.R.C. sec. 7122(a) a requirement that the Solicitor of Internal Revenue issue a written opinion as a prerequisite to a valid compromise agreement, the Circuit Court did not consider an adjacent, companion provision of the Code (I.R.C. sec. 7121, which requires closing agreements to be in writing) and thus found "no suggestion that Congress, in the course of its deliberation, otherwise considered the form that compromise agreements should take . . ." (Op. at p. 8).[1] The Fifth Circuit, in a similar situation, has taken an entirely different approach to determine Congressional intent. The Fifth Circuit has stated that "in the absence of a clear intent to the contrary, "[w]here a statute with respect to one subject contains a given provision, the omissions of such provision from a similar statute is significant to show that a different intention existed. . . ."

2. Whether a delegate of the Secretary of the Treasury may waive provisions of Treas. Reg. sec. 301.7122-1(d) and Rev. Proc. 64-44 (which describe how a writing is used to effect a compromise agreement) where the existence of a bilateral oral compromise agreement fully performed by a taxpayer is conceded by

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1 Numbers in parenthesis preceded by the designation "Op. at p." refer to pages in the February 13, 1987 Opinion of the Circuit Court.

the Commissioner for purposes of a summary judgment motion.

The Circuit Court, concluding that the procedures outlined in Treas. Reg. sec. 301.7122-1(d) and Rev. Proc. 64-44 amount to a mandatory requirement of a writing, held that such requirements could not be waived by the Secretary's statutory delegate (Op. at p.11). Contrary positions are presented in (i) a decision of the United States Supreme Court reflecting that a provision contained in Part 301 of the Treasury Regulations may be waived and (ii) a decision of the Sixth Circuit that a revenue procedure dealing with the validity of settlements between the government and taxpayers is directory and not mandatory.

3. Whether, in the context of a summary judgment motion raising an important matter of "first impression" (Op. at 6), Petitioner is entitled to a presumption that a "writing" sufficient to satisfy any alleged writing requirement of I.R.C. sec. 7122 could have been shown, but for Respondent's conceded inability to produce its administrative files relating to tax years involved in the compromise.

In the course of its discussion of I.R.C. sec. 7122(b), the Circuit Court failed to grant any such presumption to Petitioner, notwithstanding that other panels in the District of Columbia Circuit and in other Circuits have established the entitlement to such a presumption under similar circumstances.

4. Whether, in this case of "first impression," the decision of the Circuit Court, if not reversed or modified, should be applied retroactively to Petitioner.

The Circuit Court has applied its decision retroactively to Petitioner. The United States Supreme Court, however, has established a doctrine which would bar retroactive application of "an issue of first impression whose resolution was not clearly foreshadowed . . . ."

LISTING OF PARTIES

Petitioner is Pierre Boulez.

Respondent is Commissioner of Internal Revenue.

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No. _____

IN THE

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October Term, 1987

PIERRE BOULEZ,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on February 13, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals, entered February 13, 1987 and reported at 810 F.2d 209 (D.C. Cir. 1987), appears in Appendix A hereto. The opinion of the United States Tax Court, reported at 76 T.C. 209 (1981), appears in Appendix B hereto. A Memorandum Sur Order dated March 11, 1981 appears in Appendix C hereto.

STATEMENT OF JURISDICTION

The order of the Court of Appeals for the District of Columbia was entered on February 13, 1987. A timely petition for rehearing and for rehearing *en banc* with a suggestion for a rehearing *en banc* was denied on April 14, 1987 (the Orders denying the petition for rehearing and for rehearing *en banc* appear as Appendix D) and the instant petition for a writ of certiorari is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND OTHER ENACTMENTS INVOLVED

The statutory provisions involved are those sections of the Internal Revenue Code pursuant to which taxpayers and the Secretary of the Treasury or his delegate may (i) compromise a disputed claim of civil tax liability or (ii) enter into a "closing" agreement.

Section 7122 of the Internal Revenue Code, 26 U.S.C. sec. 7122 provides:

> Sec. 7122. Compromises
>
> (a) Authorization -- The Secretary or his delegate[2] may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may

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2 P.L. 94-455, Sec. 1906(b)(13)(a) amended the Internal Revenue Code of 1954, effective Feb. 1, 1977, (i) to substitute "secretary" for "secretary or his delegate" each place it appeared and (ii) to define the term "secretary", in Sec. 7701(a)(ii), to mean "the Secretary of the Treasury or his delegate."

compromise any such case after reference to the Department of Justice for prosecution or defense.

(b) Record -- Whenever a compromise is made by the Secretary or his delegate in any case, there shall be placed on file in the office of the Secretary or his delegate the opinion of the General Counsel for the Department of the Treasury or his delegate, with his reasons therefor, with a statement of --

(1) The amount of tax assessed,

(2) The amount of interest, additional amount, addition to the tax, or assessable penalty, imposed by law on the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise.

Notwithstanding the foregoing provisions of this subsection, no such opinion shall be required with respect to the compromise of any civil case in which the unpaid amount of tax assessed (including any interest, additional amount, addition to the tax, or assessable penalty) is less than $500.

Section 7121(a) of the Internal Revenue Code, 26 U.S.C. Sec. 7121(a) provides:

Sec. 7121. Closing agreements

(a) Authorization--The Secretary or his delegate is authorized to enter into an agree-

> ment in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.

Treasury Regulations, Revenue Procedures and Delegation Orders involved include the following:

> Treas. Reg. Sec. 301.7122-1
>
> Treas. Reg. Part 601.
>
> Delegation Order No. 11 (Rev. 3), 1963-2, C.B. 732
>
> Delegation Order No. 11 (Rev. 6) 1971-1, C.B. 653.

Such provisions are reproduced at Appendices E, F and G, hereto respectively.

CONCISE STATEMENT OF THE CASE

On July 26, 1978, Petitioner commenced a proceeding in the United States Tax Court pursuant to I.R.C. sec. 6413, 26 U.S.C. sec. 6413. Petitioner Pierre Boulez ("Petitioner") is a citizen of France and a world renowned music director and conductor (JA 43-44)[3].

For purposes of resolving the issues presented by summary judgment motion made on June 19, 1980, the Commissioner of Internal Revenue (the "Commissioner" or "Respondent") has stipulated to the following facts: on May 6, 1976, the Commissioner's Director of International Operations (the "Director") entered into a bila-

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3 Numbers in parenthesis preceded by the designation "JA" refer to pages in the Joint Appendix submitted to the Circuit Court.

teral oral agreement of compromise (the "Agreement") with counsel for Petitioner (Op. at 8, fn. 9). The Agreement affected Petitioner's tax liability for the years 1971 through 1974 (JA 144-147). Pursuant to the Agreement, Petitioner agreed to and filed amended tax returns for the years 1973 and 1974. In 1976, Petitioner filed a tax return for the year 1975 which followed the terms of the Agreement (JA 72-82).

In 1977, IRS commenced an audit of Petitioner's 1975 return and later expanded the audit to an examination of Petitioner's 1971 and 1972 returns. In 1978, IRS waived a notice of deficiency, informing Petitioner that he owed additional taxes for 1971 and 1972 (Op. at 5). Thus, more than two years after the Agreement was made and fully performed by Petitioner, the Commissioner disavowed the Agreement to the extent that it affected Petitioner's tax liability for the years 1971 and 1972.

The Commissioner contends the Director, as his delegate, was authorized to enter into *written* compromise agreements but, as a matter of law, was without authority to enter into an *oral* compromise agreement which bound the Commissioner (JA 19).

The United State Tax Court entered a decision, reported at 76 T.C. 209 (1981), rejecting the validity of the Agreement and finding deficiencies in income tax due from Petitioner for the years 1971 and 1972.

The Court below heard oral argument of Petitioner's appeal on September 10, 1982. Almost 4-1/2 years later, on February 13, 1987, the Circuit Court decided Petitioner's appeal. In so doing, the Circuit Court affirmed the decision of the Tax Court on the ground that the Director lacked authority to enter into an oral agreement of compromise binding the Commissioner (Op. at p. 2, 6). By decision entered April 14, 1987, the Circuit Court denied Petitioner's petition for

rehearing which also contained a suggestion for rehearing *en banc.*

REASONS FOR GRANTING THE WRIT

This petition for a writ of certiorari should be granted so that this Court may resolve a conflict between two Circuits over the following critical question: where Congress, in enacting companion sections of a statute, has expressly included a requirement in one section but omitted the same requirement from the adjacent companion section, may a Court nonetheless read such a mandate into regulations promulgated under the companion section, absent any showing of supporting legislative intent.

For purposes of a summary judgment motion, Respondent has conceded that a statutory delegate of the Secretary of the Treasury entered into a bilateral oral agreement of compromise with Petitioner's counsel. Notwithstanding Petitioner's completed performance thereunder, Respondent seeks to disavow that agreement based upon a purported lack of authority of any delegate of the Secretary of the Treasury to enter into an oral compromise under the Internal Revenue Code and related enactments.

In the instant case, Section 7122(a) of the Internal Revenue Code permits the Secretary of the Treasury or his delegate to make agreements to compromise disputed claims of civil tax liability. No mention is made of a writing requirement and no legislative history supports the suggestion that Congress nevertheless intended to mandate a writing requirement in connection with such agreements.

In an era of increasing distrust of government, resolution of the important questions presented by this writ will enable taxpayers to rely upon the government's

word when given by a person who concededly is authorized to make such agreements pursuant to statute.

Although the Circuit Court of the District of Columbia has chosen not to answer the basic question presented, it has correctly identified the question as one of "first impression" with respect to Section 7122(a) (Op. at 6). As in any case of first impression, there can be no decision of another Circuit which is in conflict involving precisely the same provision. Had the Fifth Circuit decided the instant case (see Point I, *infra*), however, Petitioner respectfully submits that an opposite finding would have been reached. Controlling principles of statutory construction of adjacent sections require the conclusion that Congress did not intend to limit compromise agreements to those made in writing.

Even if, *arguendo*, the Court were to reject the Fifth Circuit's compelling approach in interpreting Congressional intent regarding adjacent, companion provisions appearing in federal statutes, the writ should be allowed for the following additional reasons:

(a) the decision of the Circuit Court (holding that provisions appearing in "Part 301" of the Treasury Regulations cannot be waived by a delegate of the Secretary of the Treasury) conflicts with a decision of the United States Supreme Court (Point II, *infra*);

(b) the decision of the Circuit Court (holding that Revenue Procedures are mandatory - even if the Revenue Procedure in question were not obsolete, as Petitioner respectfully suggests is the case) conflicts in principle with a contrary decision of the Sixth Circuit (Point II, *infra*);

(c) other panels in the Circuit Court for the District of Columbia (as well as in other Circuits) have held that a petitioner is entitled to a favorable presumption or inference (thereby, at minimum, creating a triable question of fact) if an adversary fails to produce

relevant evidence within his control. Here, Respondent has failed to produce Petitioner's administrative files for certain tax years encompassed within the oral compromise agreement. Petitioner respectfully submits that he is entitled to the following presumption: if the complete files of Respondent were available, it would contain a writing sufficient, in any event, to confirm the oral compromise agreement made between Petitioner's counsel and the statutory delegate of the Secretary of the Treasury. Notwithstanding conflicting rulings on this threshold presumption (both within the District of Columbia Circuit and in other Circuits), the Circuit Court below affirmed a grant of summary judgment in favor of Respondent (Point III, *infra*); and

(d) the Circuit Court's decision, in applying retroactively its holding of "first impression," is in conflict with a doctrine established by the United States Supreme Court which, under circumstances present in the instant case, bars retroactive application of "an issue of first impression whose resolution is not clearly foreshadowed" (Point IV, *infra*).

THE WRIT SHOULD BE GRANTED BECAUSE OF CONFLICTS AMONG THE CIRCUITS

Respondent concedes that Section 7122(a) of the Internal Revenue Code does not expressly call for a writing, but has contended in substance that such a "requirement" should be read into the Section. The Circuit Court concluded that "the question thus posed appears to be one of first impression" (Op. at p. 6).

The Circuit Court has stated that "[u]ndeniably Section 7122(a) is facially ambiguous." After reviewing certain legislative history (including the deletion of a requirement of a writing from the final draft of the original provision of Section 7122[a]), the Court found "no suggestion that Congress, in the course

of its deliberation, otherwise considered the form that compromise agreements should take . . ." (Op. at p. 8).

I.

THE DECISION OF THE CIRCUIT COURT CONFLICTS WITH A FIFTH CIRCUIT DECISION DESCRIBING PRINCIPLES OF STATUTORY CONSTRUCTION WHICH CONTROL INTERPRETATION OF FEDERAL LEGISLATION WHERE LEGISLATIVE HISTORY OFFERS NO EXPRESS GUIDANCE

The Circuit Court has overlooked that Congress enacted Section 7122 together with an adjacent companion provision, Section 7121, to describe the manner and circumstances in which the Secretary of the Treasury, or his delegate, may settle tax disputes either by entering into a closing agreement (Section may 7121) or an agreement of compromise (Section 7122).

Section 7121, explicitly requires closing agreements (which may have future precedential value) to be made in writing. In contrast, there is no requirement on the face of Section 7122(a) for compromise agreements to be in writing.

In the process of overlooking the enactment by Congress of provisions which are adjacent and companion to Section 7121(a), the Circuit Court construed the statute in a manner which conflicts with fundamental principles of statutory construction as applied by the Fifth Circuit. As shown more fully herein, had the instant case been decided in the Fifth Circuit, the result would surely have been opposite of that reached by the Circuit Court for the District of Columbia.

In *General Electric Co.* v. *Southern Construction Co.*, 383 F.2d 135, 138 fn.4 (5th Cir. 1967), *cert. denied*, 390 U.S. 955, (1968) ("*General Electric*"), the Court

considered whether specific language appearing in one of two adjacent sections of the same act could be read into the other provision. The Court in *General Electric* observed:

> [I]f we were to consider the two subdivisions *in pari materia*, we would apply the rule that *in the absence of a clear intent to the contrary*, "(W)here a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed . . ." 82 C.J.S. Statutes sec. 306a p. 813 [citations omitted] (Emphasis added).

As in *General Electric*, "in the absence of a clear intent to the contrary," consideration *in pari materia* of Sections 7121 and 7122 should lead to the conclusion that "the omission of [a writing requirement] from a similar statute [Section 7122(a)] is significant to show that a different intention [of Congress] existed. . . ."

Moreover, a decision of the Court of Claims construes the reference to a file writing which appears in I.R.C. sec. 7122(b) to be merely *directory* and a failure to comply therewith would not affect the compromise itself or its validity. *Hamilton* v. *United States*, 342 F.2d 960, 965 (Ct. Cl. 1963).[4] The directory nature of the writing explicitly identified in Section 7122(b) further confirms that "in the absence of a clear intent to

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[4] Strangely enough, the Circuit Court "reserve[d] decision on the question whether Section 7122(b)'s call for a written record is directory or mandatory" (Op. at p. 9, fn.32). While *Hamilton* also pertains to Part 601 of the Treasury Regulations (see Op. at 12-13 and fn. 46), the Circuit Court overlooked the holding in *Hamilton* which found the writing requirement in Section 7122(b) to be "directory."

the contrary" (*General Electric*, *supra*), a mandatory writing requirement cannot be "read into" Section 7122(a).

Had the Circuit Court for the District of Columbia applied the intent doctrine established by the Fifth Circuit in *General Electric*, it could not reasonably have concluded that a "*requirement* of a writing" in Treas. Reg. sec. 301.7122-1(d) [see Point II, *infra*] is a "permissible interpretation of Section 7122" (Emphasis added) (Op. at p. 11).

Moreover, even if Treas. Reg. sec. 301.7122-1(d) did present a "permissible interpretation of Section 7122," it would not present the only such interpretation which may be followed by the Secretary of the Treasury or his delegate. The stipulated facts in the instant case (JA 42-49) confirm that the Secretary (through the Director of International Operations as his duly authorized delegate) explicitly adopted another, equally permissible interpretation of Section 7122(a).

II

THE DECISION OF THE CIRCUIT COURT, IN HOLDING THAT PROVISIONS APPEARING IN "PART 301" TREASURY REGULATIONS AND IN A REVENUE PROCEDURE CANNOT BE WAIVED, CONFLICTS WITH A DECISION OF THE UNITED STATES SUPREME COURT AND A DECISION OF THE SIXTH CIRCUIT

Treas. Reg. sec. 301.7122-1 describes a procedure pursuant to which a writing may be used to effect a compromise agreement. In concluding that Part 301 Regulations are mandatory (see Op. at p. 11 and pp. 12-13), the Circuit Court overlooked a finding to the contrary in *United States* v. *Memphis Cotton Oil Company*, 288 U.S. 62 (1933) ("*Memphis Cotton*"). Section 7122(a)

may not be treated as a mandate for a restricted view of permissible forms of compromise agreements.[5]

While the Circuit Court devotes an extensive footnote in its Opinion (fn. 53 at p. 16) to a discussion of *Memphis Cotton*, it did not address the principle therein established - Part 301 Regulations are directory and not mandatory. Respondent himself concedes the point in his May, 1982 Brief to the Circuit Court (pp. 33-34 at fn. 16), but seeks to avoid the impact of his concession by suggesting that only under "certain rare circumstances" may the Secretary's delegate "waive the requirements" of a Part 301 Regulation. (The text of footnote 16 to Respondent's brief to the Circuit Court is set forth in Appendix H hereto).

In his brief to the Circuit Court, Respondent relied upon *Missouri Pacific Railroad Co.* v. *United States*, 558 F.2d 596 (Ct. Cl. 1977) ("*Missouri Pacific*") (C.I.R. Br. 33). Both Respondent and the Circuit Court overlooked

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5 "[I]t is axiomatic that an administrative agency may not by its rules expand the grant of authority from the legislature, but must function within its mandate." *Freitas* v. *Geddes Savings and Loan Association*, 63 N.Y.2d 254, 264 (1984). "[A]dministrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute." *Jones* v. *Berman*, 37 N.Y.2d 42, 53 (1975).

Where an administrative agency arrogates to itself the right to add requirements to the mandate of the statute its regulations purport to implement, the agency's regulations must be struck down as *ultra vires* and void. *E.g.*, *see Trump-Equitable Fifth Avenue Company* v. *Gliedman*, 62 N.Y.2d 539 (1984).

the conclusion of the Court in *Missouri Pacific* (at p. 599) that:

> [t]he requirements imposed by Treasury regulations must be distinguished from those imposed by statute; the former requirements may be waived while the latter may not.

Thus, to the extent Respondent properly delegated his authority under Section 7122(a) to his Director of International Operations (see pp. 14-15, *infra*), the Director had the authority to waive any "requirements imposed by Treasury regulations. . . ." *Id.*

The Circuit Court, in substance, reads Rev. Proc. 64-44, 1964-2 C.B. 974 to require the statutory delegate of the Secretary of the Treasury to exercise delegated authority "in accordance with the strictures of" Treas. Reg. 301.7122-1 (Op. at p.19). Such conclusion conflicts in principle with the decision in *Cleveland Trust Co.* v. *United States*, 421 F.2d 475, 481-2 (6th Cir.), *cert. denied*, 400 U.S. 819 (1970) which concluded that another revenue procedure dealing with the validity of settlements between the government and taxpayers is directory and not mandatory.

Even if, *arguendo*, revenue procedures were to be treated as mandatory and not directory, Rev. Proc. 64-44 is obsolete and should have no effect upon the validity of the bilateral oral agreement of compromise made between Petitioner's counsel and the Director of International Operations as the statutory delegate of the Secretary of the Treasury.

Revision 6 of Delegation Order No. 11, 1971-1 C.B. 653 - in effect at all times relevant - delegates to the Director authority "under Section 7122 of the Internal Revenue Code to accept offers in compromise. . . ." Unlike prior revisions of Delegation Order No. 11, Revision 6 does not purport to limit the Director's authority by incorporating therein Part 301 Regulations.

The Circuit Court mistakenly has suggested that Rev. Proc. 64-44 "continued in force at all times relevant to this case and was not superceded until 1980.[6] . . ." Based solely upon the purported viability of Rev. Proc. 64-44, the Circuit Court concluded that any reference to Treas. Reg. sec. 301.7122-1(d) would have been superfluous (Op. at p. 18). Rev. Proc. 64-44, however, is tied directly to a *superceded* Revision (No. 3) of Delegation Order No. 11.[7] Since Delegation Order No. 11 (after Revision No. 3 was issued) was revised to delete any reference to Part 301 Regulations, Rev. Proc. 64-44 thereby was rendered obsolete before Taxpayer and the Director entered into the Agreement.

The Internal Revenue Manual (at 1222[3]) states that "[e]ach delegation of authority by Delegation order . . . shall contain, as a minimum * * * (d) a clear statement of any restriction imposed by the delegator on the exercise of the authority or on redelegation." Had the Commissioner intended to limit the authority granted to the Director he could have done so by making "a clear statement of any restrictions imposed." Revision 6 of Delegation Order No. 11 imposes no such restriction.

Subsequent revisions (including Revision No. 6) dropped language making the order "[s]ubject to the limitations contained in applicable regulations and procedures. . . ." Accordingly, Rev. Proc. 64-44 (which

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6 Rev. Proc. 80-6, 1980-1 C.B. 586.

7 Rev. Proc. 64-44 in pertinent part states:

> the purpose of this Revenue Procedure is to set forth the jurisdictional changes pertaining to the consideration and disposition of offers in compromise under Delegation Order No. 11 (*Rev. 3*) . . . (Emphasis added).

interprets a superceded and subsequently revised Delegation Order) cannot be used to bootstrap such a limitation back into the Delegation Order, as later revised.[8]

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[8] The Circuit Court has suggested that

> the writing requirement of Treasury Regulation Sec. 301.7122-1(d) confers rights and imposes liabilities on third parties -- as Boulez would be the first to insist if tables were turned and IRS invoked an oral compromise agreement against him (Op. at pp. 15-16).

Petitioner is not disavowing the Agreement. If Petitioner prevails, he of course would not dispute the fact that oral agreements with statutory delegates are binding. Moreover, the suggestion that Boulez would be taking a contrary position "if tables were turned" ignores the reality of compromise agreements. As a practical matter, there are few statutory delegates who are empowered to make compromise agreements with taxpayers. The Commissioner alone determines the extent to which he sub-delegates his statutory powers. IRS representatives who ordinarily deal with taxpayers on audits or administrative appeals have not been delegated such powers. The Commissioner has delegated such powers only to a small number of senior officials.

In the instant case, the Commissioner sub-delegated to his Director of International Operations the right to compromise disputed agreements involving $100,000 or less. The Commissioner, just as readily, could reduce the scope of his delegate's authority in terms of amount or circumscribe that authority by delegating only the ability to enter into written compromise agreements. As shown above, this the Commissioner did not do in Delegation Order No. 11 (Rev. 6).

III.

IN GRANTING SUMMARY JUDGMENT NOTWITHSTANDING RESPONDENT'S FAILURE TO PRODUCE RELEVANT EVIDENCE WITHIN HIS CONTROL, THE DECISION OF THE CIRCUIT COURT CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND OTHER PANELS WITHIN THE DISTRICT OF COLUMBIA CIRCUIT

In response to certain arguments raised by Respondent, Petitioner advised the Circuit Court that Respondent has failed to produce Petitioner's administrative files for certain tax years encompassed within the oral compromise agreement (Appendix V-e to Petitioner's Reply Brief in the Circuit Court). As a panel of the Court below held in another context:

> [W]hen a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him. *International Union, etc. (UAW) v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) ("UAW").[9]

The law in the Seventh and Tenth Circuit provides for the grant of a presumption favoring an adverse party when an opponent fails to produce relevant evidence

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9 The District of Columbia Circuit Court, in *Tendler v. Jaffe*, 203 F.2d 14, 19 (D.C. Cir. 19523), *cert. denied*, 346 U.S. 817 (1953) ("*Tendler*") interpreted the failure of a party to produce evidence as giving rise to a presumption that such evidence would be unfavorable. ("[T]he omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause.")

within such party's control. *P.R. Mallory & Co. v. NLRB*, 400 F.2d 956 (7th Cir. 1968); *Morgan V. Willingham*, 383 F.2d 139 (10th Cir. 1967); *Neidhoefer v. Automobile Ins. Co. of Hartford, Conn.*, 182 F.2d 269 (7th Cir. 1950).

Petitioner is entitled to the presumption that if complete files of Respondent were now available, those files would contain a written record confirming the oral compromise agreement concluded between the Secretary's delegate and Petitioner's counsel. In failing to grant such a presumption in favor of Petitioner (thus assuring the existence of a triable question of fact which bars summary judgment in favor of Respondent), the decision of the Court below is in conflict with decisions of the Seventh and Tenth Circuits as well as the *UAW* and *Tendler* decisions in the District of Columbia Circuit Court of Appeals.

Respondent argued to the Circuit Court that a writing under Section 7122(b) must be present for a valid compromise agreement to exist. (see Respondent's Brief to the Circuit Court at p. 16). The Circuit Court correctly rejected that argument (Op. at 8, fn. 32). Were such a writing found in Respondent's "missing" administrative file pertaining to Petitioner, that document may well have satisfied any arguable requirement for a writing to confirm the agreement between Petitioner's counsel and the Secretary's delegate. Accordingly, under Respondent's theory of the case, his missing files creates a question of fact which precludes the grant of summary judgment in favor of Respondent.

IV.

IN APPLYING RETROACTIVELY ITS HOLDING OF "FIRST IMPRESSION" IN THE INSTANT ACTION, THE DECISION OF THE CIRCUIT COURT CONFLICTS WITH A DOCTRINE ESTABLISHED BY THE UNITED STATES SUPREME COURT

The Circuit Court's decision, in applying retroactively its holding of "first impression," is in conflict with a doctrine established by the United States Supreme Court which, under the circumstances present in the instant case, bars retroactive application of "an issue of first impression whose resolution is not clearly foreshadowed." *See, Chevron Oil* v. *Huson*, 404 U.S. 97, 106-107 (1971) ("*Chevron*").

In *Chevron*, the United States Supreme Court identified a set of circumstances in which a judicial decision should not be applied retroactively:

> [*] First, the decision to be applied nonretroactively must establish a new principle of law . . *by deciding an issue of first impression whose resolution was not clearly foreshadowed* [citation omitted]
>
> [*] Second, . . . 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' [citation omitted]
>
> [*] Finally, . . . '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity' [citation omitted] (Emphasis added).

The Circuit Court concluded that the issue presented is one of "first impression" (Op. at p. 6) requiring interpretation of an "ambiguous" section of the Internal Revenue Code (Op. at p. 7). Accordingly, resolution of the issue "was not clearly foreshadowed."

Nothing in the Record suggests the purpose or history of the rule established in the instant case would be furthered by "retrospective operation." On the other hand, the decision, if applied retroactively to Petitioner, would produce "substantial inequitable results" since:

(a) Respondent has stipulated that a bilateral oral agreement in fact was made between Petitioner's counsel and the Secretary's statutory delegate and was fully performed by Petitioner (JA 144-147);

(b) not having had the benefit of the Circuit Court's decision of "first impression," Petitioner was entitled to believe that the Agreement which he made with the Secretary's statutory delegate would be binding;

(c) no harm could come to the Internal Revenue Service, since (i) only agreements made directly between the "alter ego" of the Secretary and a taxpayer are permitted under the pertinent delegation order and (ii) the Internal Revenue Service does not have to be concerned with potential unauthorized oral agreements made by the more than 99% of IRS' representatives to whom statutory authority to make such agreements has not been delegated;[10] and

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10 The Circuit Court observed in footnote 28 of its opinion (Op. at pp. 6-7):

> In *Botany Mills* v. *United States*, 278 U.S. 282, 289 (1929), the Court held that an "in-

(d) under the circumstances, to invalidate the Agreement retroactively "would be to sacrifice the principle of compromise to mere form of procedure and render settlements with the government delusive and uncertain." *See United States* v. *Wainer*, 240 F.2d 595 (7th Cir. 1957), *cert. denied* 355 U.S. 815 (1957).

The standards enunciated in *Chevron* require that the matter of "first impression" resolved in the instant action be applied prospectively and not in a manner to punish Petitioner who alone has shown the perseverance to pursue this case through the judicial process and thereby establish the guiding principle which others must now follow.

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formal" or "gentlemen's" agreement made by subordinate agency officials without securing the consent of the Secretary did not constitute a binding agreement under the predecessor of sec. 7122, Act of July 20, 1968, ch. 186, sec. 102, 15 Stat. 166, Rev. Stat. sec. 3229. The Court did not address, however, the validity of oral compromise agreements per se. In *McIlhenny* v. *Commissioner*, 39 F.2d 356, 358 (3d Cir. 1930), the Court, also construing Rev. Stat. sec. 3229, alluded to the fact that "there was no agreement in writing," but added "or otherwise." *Country Gas Serv., Inc.* v. *United States*, 405 F.2d 147, 149-150 (1st Cir. 1969), involved the validity of an oral compromise agreement under sec. 7122, but the court based its rejection of the agreement on the agent's lack of authority and did not discuss the need for a writing.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Dated: July 13, 1987

Respectfully submitted,

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APPENDICES

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1048

PIERRE BOULEZ, APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE, APPELLEE

Appeal from Decision of the
United States Tax Court

Argued September 10, 1982

Decided February 13, 1987

Lawrence D. Bernfeld, with whom *Alfred R. McCauley* and *Allen Greenberg* were on the brief, for appellant.

Terry L. Fredericks, Attorney, Department of Justice, with whom *Glenn L. Archer, Jr.*, Assistant Attorney General, and *Michael L. Paup*, Attorney, Department of Justice, were on the brief, for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before WALD, *Chief Judge*, ROBINSON, *Circuit Judge*, and WRIGHT, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: This appeal summons us to adjudge the validity of an oral agreement between a taxpayer and an official of the Internal Revenue Service (IRS) purporting to compromise a disputed income tax liability. The United States Tax Court held the agreement ineffective on the ground that the official lacked authority to enter into it.[1] We affirm.

I

The taxpayer, Pierre Boulez, is a citizen of France and a world-renowned music director and conductor.[2] In 1971, Boulez contracted with Beacon Concerts, Ltd., a United Kingdom corporation,[3] to serve as director and conductor for musical organizations selected by Beacon.[4] The latter in turn contracted to provide Boulez's services to the New York Philharmonic Symphony and the Cleveland Orchestra, both United States corporations.[5]

For tax years 1971 and 1972, Boulez was a nonresident alien for purposes of United States income taxes.[6] During those years, Beacon received $207,473 for Boulez's performances in the United States[7] and, after de-

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[1] *Boulez* v. *Commissioner*, 76 T.C. 209 (1981).

[2] Joint Appendix (J. App.) 43-44.

[3] J. App. 44.

[4] J. App. 44. The contract was a "loan-out" agreement—one in which an artist contracts with a management company to arrange his bookings and consents to render services at the company's direction. See J. App. 101-105 (agreement between Boulez and Beacon).

[5] J. App. 43-44, 106-132.

[6] J. App. 43.

[7] See Brief for Appellee at 3 & n.1.

ducting its expenses and commissions, paid Boulez $188,495.[8] Boulez filed United States nonresident alien income tax returns for 1971 and 1972, but did not include in his gross income any of the monies Beacon received or paid to him for his services.[9] Boulez continued to perform in the United States for the New York Philharmonic Symphony during 1973, 1974 and 1975. He filed nonresident alien returns for the 1973 and 1974 tax years, and again failed to report any amount received by or from Beacon.[10]

In 1975, IRS launched an investigation of Boulez's tax obligations respecting the monies flowing through Beacon.[11] Boulez obtained counsel,[12] who engaged in a protracted series of negotiations with IRS on Boulez's potential tax liability and assertedly reached an oral compromise[13] with IRS's Director of International Operations.[14] Boulez claims that he was to file amended re-

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[8] J. App. 47. Boulez expended $85,515 in performing in the United States in 1971 and 1972. *Id.*

[9] J. App. 50-62; Brief for Appellee at 3. See Rev. Rul. 74-330, 1974-2 C.B. 278; Rev. Rul. 74-331, 1974-2 C.B. 282.

[10] J. App. 46-47.

[11] J. App. 47. In the course of its probe, IRS requested the Philharmonic to withhold for income tax purposes 30% of the gross amount paid to Beacon for Boulez's services. See J. App. 45.

[12] J. App. 45.

[13] The Commissioner of Internal Revenue stipulated to the existence of the oral agreement, see J. App. 144-147, for the limited purpose of enabling the Tax Court to dispose of his motion for summary judgment. *Boulez* v. *Commissioner*, *supra* note 1, 76 T.C. at 215 n.9. Consequently, we make the same assumption for purposes of our review.

[14] J. App. 46. This official is now known as the Director, Foreign Operations District, but his duties are unchanged. The Director administers the internal revenue laws on behalf of IRS as they relate to "foreign taxpayers deriving income

turns for 1973 and 1974 including in gross income the amounts paid to Beacon for his services in the United States; and that, in exchange, no adjustments were to be made by IRS, no payments for years prior to 1973 would be required, and no penalties for late filing or payment would be assessed.[15]

Boulez then filed amended 1973 and 1974 returns conforming to the compromise and remitted $53,841 in additional taxes.[16] Appended to the amended returns was a letter from Boulez's counsel stating that these returns were "in accordance with [counsel's] conversation with" the Director.[17]

Thereafter, Boulez did not oppose inclusion in his gross income for 1973 and years following of the amounts paid to Beacon for his performances in the United States.[18] He did not resist the applicability of any income tax convention to Beacon's receipts for or payments to him, nor did he seek any refund of taxes paid in consequence of the compromise. Ultimately, he terminated his arrangement with Beacon and personally assumed the obligations imposed on Beacon by the contract with the Philharmonic.[19]

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from sources within the United States." Treas. Reg. § 601.101 (a) (1986).

[15] See Affidavit of Irving Moskovitz at 2, J. App. 141.

[16] *Boulez* v. *Commissioner*, *supra* note 1, 76 T.C. at 209-211. J. App. 134.

[17] Letter from Irving Moskovitz to Warren Josephs (Feb. 1, 1977), J. App. 134. IRS accepted the amended returns and imposed no penalties. J. App. 48.

[18] Nor did Boulez contest the applicability to him of Rev. Ruls. 74-330, 1974-2 C.B. 278 or 74-331, 1974-2 C.B. 282, in which the Commissioner explained his position regarding foreign entertainers and loan-out arrangements. See *Boulez* v. *Commissioner*, *supra* note 1, 76 T.C. at 210.

[19] *Id.* at 210-211.

In 1977, IRS commenced an unrelated audit of Boulez's 1975 return, and later expanded it to an examination of his 1971 and 1972 returns.[20] In 1978, IRS issued a notice of deficiency informing Boulez that he owed additional taxes for 1971 and 1972. Underlying the notice was a determination that Boulez should have included in his gross income for those years amounts paid to Beacon for his performances in the United States.[21]

Boulez challenged this ruling in the Tax Court [22] and moved for summary judgment on two grounds. He claimed that the 1976 oral agreement, which purported to settle any tax liability for 1971 and 1972, constituted a binding compromise.[23] Alternatively, Boulez asserted that if the agreement was not a bar, IRS was equitably estopped from assessing the deficiency because Boulez had relied upon the agreement and changed his position to his detriment.[24] The Tax Court held in favor of the Commissioner, reasoning that the Director of International Operations lacked authority to bind IRS by means of an oral agreement, because Treasury Regulation § 301.7122-1(d) requires offers and acceptances of compromise to be in writing.[25] From this decision, Boulez now appeals.

II

Boulez presses two arguments in an effort to demonstrate that the Tax Court erred in refusing to grant

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[20] J. App. 47.

[21] J. App. 47.

[22] *Boulez* v. *Commissioner*, *supra* note 1. Boulez chose to litigate only the legitimacy of the oral agreement; he did not claim entitlement to a refund of any part of the taxes he had paid. 76 T.C. at 211.

[23] *Id.*

[24] *Id.* at 211, 214.

[25] *Id.* at 212-213. See Treas. Reg. § 301.7122-1(d) (1986) (quoted in relevant part *infra* note 33).

summary judgment in his favor. He first contends that the Treasury Regulation § 301.7122-1(d) is invalid for inconsistency with Section 7122(a) of the Internal Revenue Code [26] which, he says, sanctions oral compromises. He further contends that even if the regulation imposes a valid limitation on statutory authority to compromise, it is merely directory, and that a delegation order empowered the Director of International Operations, as the Commissioner's delegate at the time of the agreement, to accept Boulez's oral offer of compromise and thus to bind the agency. We agree with Boulez that the statute does not of its own accord forbid oral compromise agreements. but conclude that the regulation. which requires that all compromises be reduced to writing,[27] has the force and effect of law, and that the Director lacked authority to waive it.

The Commissioner argues that Section 7122(a) of the Code manifests the intent of Congress to outlaw oral compromise agreements. The Commissioner concedes, as he must, that the section does not expressly call for a writing, but he maintains that when viewed against the backdrop of its legislative history, it should be read to incorporate that requirement. The question thus posed appears to be one of first impression.[28]

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[26] 26 U.S.C. § 7122(a) (1982), providing:

> The Secretary or his delegate may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.

[27] See Treas. Reg. § 301.7122-1(d) (1986) (quoted in relevant part *infra* note 33).

[28] In *Botany Mills* v. *United States*, 278 U.S. 282, 289, 49 S.Ct. 129, 132, 73 L.Ed. 379, 385 (1929), the Court held that an "informal" or "gentlemen's" agreement made by subordinate agency officials without securing the consent of the Secretary did not constitute a binding agreement under the

Undeniably, Section 7122(a) is facially ambiguous. It does not specify that compromise agreements must be in writing, nor does it explicitly sanction oral settlements. The legislative history, although cited by the Commissioner in support of his position, does not plainly settle the question either. When, more than a century ago, the provision authorizing compromise agreements was first drafted,[29] the bill made the written opinion of the Solicitor of Internal Revenue prerequisite to a valid compromise agreement.[30] This particular requirement

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predecessor of § 7122, Act of July 20, 1968, ch. 186, § 102, 15 Stat. 166, Rev. Stat. § 3229. The Court did not address, however, the validity of oral compromise agreements per se. In *McIlhenny* v. *Commissioner*, 39 F.2d 356, 358 (3d Cir. 1930), the court, also construing Rev. Stat. § 3229, alluded to the fact that "there was no agreement in writing," but added "or otherwise." *Country Gas Serv., Inc.* v. *United States*, 405 F.2d 147, 149-150 (1st Cir. 1969), involved the validity of an oral compromise agreement under § 7122, but the court based its rejection of the agreement on the agent's lack of authority and did not discuss the need for a writing.

[29] The precursor of 26 U.S.C. § 7122(a) (1982) may be found in the Act of July 20, 1868, ch. 186, § 102, 15 Stat. 124, 166, and was carried forward into the Internal Revenue Code of 1939 as § 3761.

[30] Senator Sherman, the proponent of this requirement, explained that its purpose was to ensure "that the Commissioner of Internal Revenue shall never make a compromise until after a full and fair investigation." Cong. Globe, 40th Cong., 2d Sess. 3773 (1868) (statement of Sen. Sherman). The object of the provision was "to see that the Commissioner has all the facts before him, prepared by an officer who is supposed to be a lawyer." *Id.* (statement of Sen. Sherman). In the course of the floor debate that ensued over this proposal, the Senator never addressed the question whether compromise agreements had to be reduced to writing before they were binding. As he understood his amendment, it served only as a check on the power of the Commissioner to enter into settlements:

> Now we provide that no compromise can be made except with the written assent of the Secretary of the Treasury; and further than that, in order to show that it cannot be

appears to be the only precondition Congress considered incorporating into the statute. It was deleted from the final version, however, and has not reappeared in any successor statute.[31] We can find no suggestion that Congress, in the course of its deliberations, otherwise considered the form that compromise agreements should take. We thus are persuaded that Congress left to the Secretary of the Treasury the task of promulgating regulations addressing the requisite manner of offer and acceptance of compromises.[32]

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done upon insufficient information, we require another officer to file his opinion in writing, setting out certain facts, the basis of the opinion by the Secretary of the Treasury.

Id. at 3775 (statement of Sen. Sherman).

[31] The Commissioner relies heavily upon a recently-excised section of a related statute concerning compromises reached after entry of a judgment. 31 U.S.C. § 194 (1976) provided:

> Upon a report by a United States attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the General Counsel for the Department of the Treasury, the Secretary of the Treasury is hereby authorized to compromise such claim accordingly. . . .

But this section did not in terms require the Secretary to reduce compromises to writing. Moreover, §§ 194 and 7122 were not enacted contemporaneously, neither provision referred to the other, and § 194 was finally repealed in 1978. Act of Nov. 6, 1978, Pub. L. No. 95-598, § 322(c), 92 Stat. 2549, 2679. We cannot see how this defunct provision, which contained no explicit or implicit requirement of a writing and which dealt only with post-judgment compromises, sheds any light on the legislative intentions animating § 7122(a).

[32] The Commissioner attempts to minimize the omission of a writing requirement in § 7122(a) by emphasizing instead the written-record requirement of § 7122(b):

> (b) **Record.**—Whenever a compromise is made by the Secretary or his delegate in any case, there shall be placed

III

The Secretary has issued Treasury Regulation § 301.7122-1(d), which specifically requires a written offer and acceptance.[33] Boulez acknowledges that the com-

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on file in the office of the Secretary or his delegate the opinion of the General Counsel for the Department of the Treasury or his delegate, with his reasons therefor, with a statement of—

(1) The amount of tax assessed,

(2) The amount of interest, additional amount, addition to the tax, or assessable penalty, imposed by law on the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise. . . .

26 U.S.C. § 7122(b) (1982). Insisting that creation of a written record is a statutory prerequisite to settlement of a tax dispute, the Commissioner argues that the absence of such a record in this case renders the oral compromise without legal effect. Brief for Appellee at 16.

The Tax Court found it unnecessary to resolve this question, *Boulez* v. *Commissioner*, *supra* note 1, 76 T.C. at 214 n.8. We likewise reserve decision on the question whether § 7122(b)'s call for a written record is directory or mandatory. We note, however, that the Commissioner does not distinguish between the authority to utilize compromise agreements conferred by § 7122(a), which surely cannot be doubted when the agreements are in writing, and the responsibility for maintaining records of such compromise agreements imposed upon the Department of the Treasury by § 7122(b). To the extent that the Commissioner suggests that the taxpayer's failure to produce a § 7122(b) record invalidates a compromise authorized by § 7122(a), the argument may carry little weight, for noncompliance with § 7122(b) can hardly be reasonably charged to the taxpayer, who is powerless to effect it.

[33] Treas. Reg. § 301.7122-1(d) (1986) in relevant part provides:

Procedure with respect to offers in compromise—

(1) **Submission of offers.** Offers in compromise shall be submitted on forms prescribed by the Internal Revenue

promise upon which he relies did not satisfy this demand, but claims that the regulation conflicts with the statute. Boulez further claims that breach of the regulation should not affect the validity of the compromise agreement because the regulation is merely directory in character and because in any event the Director, as the Secretary's delegate, had authority to waive it in his instance. We find each of these arguments unpersuasive.

We address first the contention that the regulation contravenes the intent of Congress.[34] To prevail on this argument, Boulez must overcome the strong presumption of validity to which Treasury regulations are entitled.[35] The Supreme Court has consistently declared that a Treasury regulation must be complied with unless the taxpayer can demonstrate that it is " 'unreasonable and plainly inconsistent with the revenue statutes.' " [36]

Service which may be obtained from district directors of internal revenue, and should generally be accompanied by a remittance representing the amount of the compromise offer or a deposit if the offer provides for future installment payments. . . .

(3) **Acceptance.** An offer in compromise shall be considered accepted only when the proponent thereof is so notified in writing. . . .

[34] See Reply Brief for Appellant at 19-20.

[35] E.g., *Poirier & McLane Corp* v. *Commissioner*, 547 F.2d 161, 167 (2d Cir. 1976), *cert. denied*, 431 U.S. 967, 97 S.Ct. 2925, 53 L.Ed.2d 1063 (1977); *Beal Foundation* v. *United States*, 559 F.2d 359, 361 (5th Cir. 1977); *United Telecommunications, Inc.* v. *Commissioner*, 589 F.2d 1383, 1387 (10th Cir. 1978), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2839, 61 L.Ed.2d 284 (1979).

[36] *Commissioner* v. *Portland Cement Co.*, 450 U.S. 156, 169, 101 S.Ct. 1037, 1045, 67 L.Ed.2d 140, 151 (1981) (quoting *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501, 68 S.Ct. 695, 698, 92 L.Ed. 831, 836 (1948)); accord *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 533 n.11, 99 S.Ct. 773, 781 n.11, 58 L.Ed.2d 785, 796 n.11 (1979); *Fawcus*

It is evident that Boulez has not discharged this burden. The crux of his argument is that Section 7122 sanctions oral compromises and that the Secretary cannot by regulation impose additional requirements that undermine the congressional purpose.[37] To be sure, courts will not hesitate to invalidate treasury regulations that do not reasonably adhere to statutory dictates or which frustrate legislative objectives,[38] but this case presents neither situation. Congress, in enacting Section 7122, empowered the Secretary to compromise disputed tax liabilities, but left to the Secretary the mechanics of effecting settlements.[39] In turn, the Secretary in specifying in Treasury Regulation § 301.7122-1(d)[40] that all offers of compromise be submitted and accepted in writing,[41] simply defined the form that compromise agreements must take. We find the requirement of a writing entirely reasonable, and a wholly permissible interpretation of Section 7122.

When, therefore, the parties negotiated the compromise of Boulez's 1971-74 tax liability, they did so subject to the terms of the regulation, one of which is that the compromise agreement be in writing. Moreover, the

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Mach. Co. v. *United States*, 282 U.S. 375, 378, 51 S.Ct. 144, 145, 75 L.Ed. 397, 399 (1931).

[37] See Reply Brief for Appellant at 19-20.

[38] See, e.g., *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16, 102 S.Ct. 821, 70 L.Ed.2d 792 (1982); *Rowan Cos.* v. *United States*, 452 U.S. 247, 101 S.Ct. 2288, 68 L.Ed.2d 814 (1981).

[39] See text *supra* at notes 29-32.

[40] The Secretary has not himself designated officers who may negotiate and accept compromises, but instead has chosen to delegate the task of designation to the Commissioner. See Treas. Dep't Order No. 150-25, 18 Fed. Reg. 3238 (1953), as amended by Order No. 150-36, 1954-2 C.B. 733.

[41] See Treas. Reg. § 301.7122-1(d) (1986) (quoted in relevant part *supra* note 33).

regulation provides that "offers in compromise shall be submitted on forms prescribed by the Internal Revenue Service . . .," [42] and warns that "[a]n offer in compromise shall be considered accepted only when the proponent thereof is so notified in writing." [43] In the face of so unambiguous a mandate, we must adjudge the oral compromise devoid of binding effect unless for some reason it did not obtain in this case.

Acknowledging the compromise in issue was never reduced to writing in accordance with the strictures of the regulation, Boulez contends the oversight was inconsequential. The regulation, he asserts, is merely a procedural specification, directory and not mandatory in nature, whose breach should not affect the enforcement of the compromise agreement.[44] To demand full compliance with its terms, he says, is to adhere to a "technical procedural approach" that " 'would [. . .] sacrifice the principle of compromise to [the] mere form of procedure.' " [45]

We emphatically reject Boulez's characterization of the regulation, as well as his estimate of the significance of its breach. The authority on which Boulez relies in labeling the regulation directory concerns, not Part 301, but Part 601 of the Treasury regulations, otherwise known as the "Statement of Procedural Rules." [46] Part 601

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[42] Treas. Reg. § 301.7122-1(d)(1) (1986) (quoted in relevant part *supra* note 33).

[43] *Id.* § 301.7122-1(d)(3) (quoted in relevant part *supra* note 33).

[44] Brief for Appellant at 36-38.

[45] Brief for Appellant at 39 (quoting *United States* v. *Wainer*, 240 F.2d 595, 598 (7th Cir.), *cert. denied*, 355 U.S. 815, 78 S.Ct. 15, 2 L.Ed.2d 32 (1957)).

[46] Treas. Reg. pt. 601 (1986). See Brief for Appellant at 36-38 (citing *Luhring* v. *Glotzbach*, 304 F.2d 560 (4th Cir. 1962); *Hamilton* v. *United States*, 324 F.2d 960, 963 (Ct. Cl. 1963); *Bonacci* v. *Commissioner*, 46 T.C.M. 714, 718 (1977)).

rules differ significantly from the regulations here in question. Issued by the Commissioner, without need for approval by the Secretary, they serve merely as guidelines for conducting the internal affairs of the agency. The authority of the Commisisoner to issue such rules derives from a statute empowering him to promulgate rules "for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use and preservation of the records, papers, and property."[47] As such, the Statement of Procedural Rules is held to be directory, not mandatory in nature.[48]

By contrast, it is the Secretary who possesses the authority to "prescribe all needful rules and regulations for the enforcement" of the internal revenue laws.[49] These regulations, when consistent with and reasonably adapted

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[47] 5 U.S.C. § 301 (1982); see 26 C.F.R. § 601.101-.109 (1986); see also *Rosenberg* v. *Commissioner*, 450 F.2d 529, 531 (10th Cir. 1971) (procedural rules of Part 601 "are not Treasury Decisions or Regulations").

[48] *Luhring* v. *Glotzbach*, *supra* note 48, 304 F.2d at 565; *Einhorn* v. *DeWitt*, 618 F.2d 347, 348-349 (5th Cir. 1980); *Smith* v. *United States*, 478 F.2d 398, 400 (5th Cir. 1973) ("the provisions of the Statement of Procedural Rules are merely directory, and not mandatory"); *Rosenberg* v. *Commissioner*, *supra* note 47, 450 F.2d at 532-533. Cf. *United States* v. *Horne*, 714 F.2d 206, 207 (1st Cir. 1983) (provisions of Internal Revenue Manual, like Statement of Procedural Rules, are not mandatory and lack force of law); *United States* v. *Will*, 671 F.2d 963, 967 (6th Cir. 1982) (Internal Revenue Manual "adopted solely for the internal administration of the IRS, rather than for the protection of the taxpayer, does not confer any rights upon the taxpayer"); *Cleveland Trust Co.* v. *United States*, 421 F.2d 475, 481-482 (6th Cir.), *cert. denied*, 400 U.S. 819, 91 S.Ct. 35, 27 L.Ed.2d 46 (1970) (revenue procedure held to be directory, not mandatory).

[49] 26 U.S.C. § 7805(a) (1982).

to enforcement of those statutes, have the force of law.[50] Treasury Regulation § 301.7122-1(d), promulgated by the Secretary pursuant to this statutory grant, announces the prerequisites to binding compromises under Section 7122. Its terms are mandatory, not directory in character.[51]

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[50] See note 36 *supra* and accompanying text; see also *United States* v. *Correll*, 389 U.S. 299, 305-306, 88 S.Ct. 445, 449, 19 L.Ed.2d 537, 542-543 (1967) (invoking "the settled principle that 'Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law' ") (*quoting Helvering* v. *Winmill*, 305 U.S. 79, 83, 59 S.Ct. 45, 46, 83 L.Ed. 52, 55 (1938)).

[51] See *Shumaker* v. *Commissioner of Internal Revenue*, 648 F.2d 1198, 1199-1200 (9th Cir. 1981) ("IRS regulations establish[ing] the procedures for closing agreements and compromises pursuant to 26 U.S.C. § 7121, 7122 . . . are exclusive") (citations omitted) (neither IRS' informal acceptance of taxpayer's amended returns nor adjustments to his tax crediting him with amount in controversy constitute a binding agreement under the tax laws).

Boulez argues that the regulatory scheme itself suggests that the Secretary intended to permit his delegate to waive the express writing requirement of Treas. Reg. § 301.7122-1(d). Noting that subsection (d)(1) of the regulation provides that offers in compromise must be submitted on forms prescribed by IRS, see note 33 *supra*, and that Treas. Reg. § 601.203(b) (1986) identifies Form 656 as the form appropriate for § 301.7122-1(d) submissions, Boulez observes that Form 656 pertains to cash-tender compromises, and so could not have served to record the compromise agreement stipulated in the instant case. Since the authority of the Secretary to compromise pursuant to 26 U.S.C. § 7122(a) is not limited to receipt of a cash tender, Boulez contends that residual discretionary authority over compromise procedure is retained by the Secretary despite the specific language of § 301.7122-1(d). From this he concludes that the Secretary or his delegate may dispense with the writing requirement without

Boulez's claim that exacting compliance with the writing requirement of Treasury Regulation § 301.7122-1(d) reflects a "technical procedural approach" to the Treasury regulations is simply untenable. We are not dealing with a mere housekeeping provision, but with a fundamental tenet of formalizing agreements. Unlike procedures governing the internal affairs of IRS,[82] the writing requirement of Treasury Regulation § 301.7122-1(d) confers rights and imposes liabilities on third parties—

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affecting the validity of the compromise. See Reply Brief for Appellant at 17-18.

We are unmoved by this argument. We are asked to infer from the fact that the Treasury regulations do not specify the full array of forms appropriate for § 301.7122-1(d) submissions an intent to invest the Secretary's delegates with discretion to waive the requirement of a written submission, and this, we think, defies common sense. Incomplete identification of the relevant forms for submissions may indicate latitude with respect to the form on which the submission is recorded, but not with respect to the recording requirement generally. The terms of Treas. Reg. § 301.7122-1(d) bear out this reading. While subsection (d)(1), pertaining to the submission of offers in compromise, refers to submissions on prescribed forms, subsection (d)(3), pertaining to acceptances of offers in compromise, states in broad terms that "[a]n offer in compromise shall be considered accepted only when the proponent thereof is so notified in writing." Treas. Reg. § 301.7122-1(d)(3) (1986). Clearly, incomplete identification of forms for § 301.7122-1(d) submissions in no way alters the requirement of the regulation that such submissions be rendered in writing.

[82] Cf. *Smith* v. *United States*, *supra* note 48, 478 F.2d at 400 (IRS claims valid despite breach of directory rules providing for mailing of notice of disallowance to taxpayer's "recognized representative" and for mailing taxpayer 30-day letter prior to issuance of statutory notice of disallowance); *Rosenberg* v. *Commissioner*, *supra* note 47, 450 F.2d at 532-533 (IRS claims valid despite breach of directory rules providing for prelitigation conference with taxpayer, where taxpayer provided full hearing and determination de novo in Tax Court).

as Boulez would be the first to insist if tables were turned and IRS invoked an oral compromise agreement against him. Conditioning the enforceability of Section 7122 compromise agreements on compliance with the writing requirement of Treasury Regulation § 301.7122-1 (d) hardly evinces a hypertechnical approach to application of the rules.[53]

IV

Boulez nonetheless maintains that even if the regulation is not precatory in nature, the Director of Interna-

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[53] Our holding in this case is thus consistent with the ruling in *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62, 53 S.Ct. 278, 77 L.Ed 619 (1933), where the Supreme Court held the IRS obliged to countenance amendment of a taxpayer's filing to conform to a Treasury regulation ordering the grounds for a refund suit to be described in the initial claim. As the purpose of the provision was to ensure notice to the Commissioner of the various claims the taxpayer was seeking to assert, and the taxpayer's belated attempt to amend his refund claim would afford the requisite notice, the Court concluded flexible application of the regulation to be appropriate. *Id.* at 69-73, 53 S.Ct. at 281-282, 77 L.Ed. 623-626.

Boulez's attempt to read *Memphis Cotton* as broadly sanctioning waiver of Treasury regulations, see Reply Brief for Appellant at 17, is unavailing. First, the Court in *Memphis Cotton* explicitly rested its holding on the general trend toward liberalizing pleading requirements, see *id.* at 72, 53 S.Ct. at 282, 77 L.Ed. at 625, a concern of little relevance here. Second, unlike the situation in *Memphis Cotton*—involving a taxpayer's attempt to satisfy regulatory requirements by amending a filing in a manner which posed no disruption to the orderly disposition of his claim—the so-called "waiver" here sought is intended to nullify a regulatory requirement precisely to enable Boulez to foreclose IRS from exploring his 1971-72 tax liability. By requiring documentation of the terms of compromise agreements, Treas. Reg. § 301.7122-1(d) seeks to protect both the taxpayer and the Commissioner from disputes such as the one before us. The flexibility counseled by Memphis Cotton in no respect compels us to tolerate breach of no fundamental and sensible a rule as the documentation requirement imposed by § 301.7122-1(d).

tional Operations had authority to waive it in his instance.[54] He asserts that Delegation Order No. 11,[55] which empowered the Director to accept offers to compromise under Section 7122, does not confine itself to instances of full compliance with applicable regulations, and thus enabled the Director to enter into the oral agreement with Boulez's counsel.[56] Put another way, Boulez insists that the Director's authorization was not limited by Treasury Regulation § 301.7122-1(d).[57]

This argument is flawed in two respects. First, the power conferred by Delegation Order No. 11 to enter into compromise agreements is sharply circumscribed by Revenue Procedure 64-44:

> This is a "limited" delegation to the extent that the delegated authority must be exercised in accordance with the limitations prescribed by section 301.7122-1 of the Regulations on Procedure and Adminisration

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[54] Brief for Appellant at 26-35.

[55] Delegation Order No. 11 (Rev. 6), 1971-1 C.B. 653, in relevant part provides:

> **Delegation of Authority to Accept or Reject Offers of Compromise.**
>
> Pursuant to the authority vested in the Commissioner of Internal Revenue . . . it is hereby ordered:
>
> 1. District Director, Assistant District Director, the Director of International Operations and the Assistant Director of International Operations are delegated authority, under section 7122 of the Internal Revenue Code, to accept offers in compromise in cases in which the liability sought to be compromised (including any interest, additional amount, addition to the tax, or assessable penalty) is less than $100,000, to accept offers involving specific penalties, and to reject offers in compromise regardless of the amount of liability sought to be compromised.

[56] Brief for Appellant at 26-28.

[57] Brief for Appellant at 26-35.

and with procedures established by the National Office.[58]

Since the regulation calls for compromise agreements in writing, it is clear that the Commissioner, in delegating to the Director authority to compromise disputed tax claims, could not have intended that it could be exercised in contravention of the regulation.

To circumvent the limiting language of Revenue Procedure 64-44, Boulez points out that it specifically referred to Delegation Order No. 11 (Rev. 3),[59] and argues that it was "rendered obsolete" by Delegation Order No. 11 (Rev. 4),[60] the order in effect at the time of the compromise agreement in suit.[61] Boulez contends that because Revision 4 did not contain the phrase "subject to limitations contained in applicable regulations and procedures," the authority of the Director of International Operations was not curtailed by Treasury Regulation § 301.7122-1(d).

We may easily reject this argument. We are in complete accord with the Tax Court's conclusion that "in light of the clear reference to the limitations prescribed by sec. 301.7122-1, Proced. & Admin. Regs., set forth in Rev. Proc. 64-44, repetition of that language in subsequent revisions of Delegation Order No. 11 would have been superfluous."[62] Revenue Procedure 64-44 continued in force at all times relevant to this case and was not

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[58] Rev. Proc. 64-44, 1964-2 C.B. 974.

[59] See 1963-2 C.B. 732.

[60] 1968-1 C.B. 735.

[61] See Brief for Appellant at 32.

[62] *Boulez* v. *Commissioner, supra* note 1, 76 T.C. at 213 & n.6. Moreover, Delegation Order No. 11 (Rev. 4) explicitly relies on Treas. Reg. § 301.7122-1 as one of its sources of authority. 1968-1 C.B. 735, 736.

superseded until 1980 when Revenue Procedure 80-6 [63] was issued. Significantly, Revenue Procedure 80-6 contains virtually identical language, requiring the delegated authority to be exercised in accordance with the strictures of Treasury Regulation § 301.7122-1.[64]

More deeply, Boulez's assertion that the delegation order empowered the Director to waive application of the writing requirement—either because the order lacked restricting language or by virtue of some authority inherent in its terms—misconceives the nature of the delegation here. Whatever discretion the delegation order conferred upon the Director was discretion to compromise claims of tax liability, not the procedure by which compromise agreements were to be formalized.[65] Acting in contravention of a regulation governing execution of compromise agreements, the Director was as much without authority to join in the oral arrangement with Boulez's counsel as he would have been had power to compromise never been delegated to him.[66]

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[63] 1980-1 C.B. 586, 589.

[64] See *id.* at 587.

[65] Indeed, we do not see how a delegation order, promulgated by the Commissioner without the specific approval of the Secretary could of its own accord override a Treasury regulation promulgated by the Secretary pursuant to his statutory authority.

[66] Cf. *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 288, 49 S.Ct. 129, 131, 73 L.Ed. 379, 385 (1929) (compromise of tax liability lacked binding effect where executed by subordinate officials in IRS and approved by Commissioner but never ratified by Secretary as required by statute); *Country Gas Serv., Inc.* v. *United States*, *supra* note 28, 405 F.2d at 149-150 (no binding compromise of tax liability where agreement undertaken by official of IRS lacking explicit delegation of authority).

On this appeal, Boulez has abandoned the estoppel arguments he urged upon the Tax Court,[67] and so relieves us of the necessity of addressing them here.[68] He does, how-

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[67] See *Boulez* v. *Commissioner*, *supra* note 1, 76 T.C. at 214-217.

[68] Claims of estoppel arising from the behavior of governmental employees may be asserted only in a narrow category of circumstances. The Tax Court held that the circumstances stipulated in this case fell outside that category. See *id.* Though we are not called upon to address Boulez's estoppel claim on this appeal, we think his attempt to reiterate equitable arguments in the language of public policy, see text *infra* at note 69, warrants mention of the principles framing governmental estoppel. First, those who deal with the Government are charged with knowledge of applicable statutes and regulations. The Supreme Court delivered this warning in unequivocal terms in *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947):

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or through the rule-making power. . . . Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents.

Id. at 384-385, 68 S.Ct. at 3, 92 L.Ed. at 15 (citations omitted). Furthermore, courts called upon to recognize equitable claims emanating from the conduct of government employees who provide erroneous information or act in a manner inviting reliance cannot evaluate such claims as though the transaction were merely between private parties. "The oft-quoted observation . . . that 'Men must turn square corners when they deal with the Government,' does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Id.* (quoting *Rock Island, A. & I. R.R.* v. *United States*, 254 U.S. 141, 143, 41 S.Ct. 55, 56, 65 L.Ed. 188, 189 (1920)). The principle is no different where the

ever, renew his equitable arguments in the form of a policy argument to the effect that taxpayer confidence in the revenue system is best served by enforcement of oral agreements of the character at issue.[69] We think, to the contrary, that confidence in the system is promoted by even-handed application of publicly-accessible regulations, especially where, as here, their purpose is to minimize disputes over the existence and terms of agreements between taxpayers and the Government of the type giving rise to the instant litigation. Indeed, when a compromise of tax liability is at issue, the need for rigorous compliance with pertinent regulations may be at its greatest, for not only the integrity of the public fisc but also public faith in the equitable enforcement of the tax laws hangs in the balance. The writing requirement of Treasury Regulation § 301.7122-1(d) is a legally reasonable and an administratively sound condition to attach to exercises of delegated authority to compromise disputed tax liabilities, and justice is plainly served by consistent adherence to it.

The judgment of the Tax Court is accordingly

Affirmed.

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requirement is promulgated by the agency charged by Congress with administering a statute. *Id.*; *Schweiker* v. *Hansen*, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981) (per curiam). Finally, no distinction between substantive and procedural requirements suffices to mitigate the court's responsibility to ensure observance of regulations governing claims on the public fisc. *Id.* at 790, 101 S.Ct. at 1472, 67 L.Ed.2d at 690 ("[a] court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits").

[69] Brief for Appellant at 41-42.

APPENDIX B

Opinion of the United States Tax Court

Docket No. 8902-78

Filed: February 4, 1981

PIERRE BOULEZ, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Allen Greenberg, for the petitioner.

Theodore J. Kletnick and *Anne Hintermeister,* for the respondent.

Opinion for the Court filed by *Judge* TANNENWALD

Respondent determined deficiencies in petitioner's income tax in the amounts of $25,247.68 for the taxable year ended December 31, 1971, and $19,212 for the taxable year ended December 31, 1972. The case is before us on petitioner's motion for summary judgment but, as will subsequently appear, its posture is such that the Court may be in a position to enter a qualified decision for respondent (see note 2 *infra*).

Petitioner Pierre Boulez (Boulez), a French citizen, is a world-renowned conductor, composer, and music

director. During 1971 and 1972, Boulez, then a resident of Germany, pursuant to a contract entered into with Beacon Concerts, Ltd. (Beacon), a United Kingdom corporation, performed services in the United States for the New York Philharmonic Orchestra (Philharmonic) and the Cleveland Orchestra under separate contracts entered into by each with Beacon.

Boulez continued to perform services in the United States for the Philharmonic in 1973, 1974, and 1975. Boulez filed timely United States Nonresident Alien Income Tax Returns with the Internal Revenue Service for each of the years 1971 through 1975. In July 1975, the Internal Revenue Service requested that the Philharmonic withhold U.S. income tax at the rate of 30 percent on the gross income paid for Boulez' services. In March 1976, Boulez engaged the services of Graubard, Moskovitz, McGoldrick, Dannett & Horowitz to represent him before the Internal Revenue Service. In this connection, Irving Moskovitz (Moskovitz) appeared for Boulez before, and negotiated on behalf of Boulez with, the Director of International Operations, Joseph McGowan (McGowan).

On May 3, 1976, Moskovitz conferred with McGowan in the latter's office in Washington, D.C. Although there is a genuine issue of material fact as to whether they reached an agreement at that meeting, respondent has conceded that, for the limited purpose of disposing of petitioner's motion, the Court may assume that an oral agreement of compromise did exist, which included the following:

Moskovitz, on behalf of Boulez, agreed that Boulez would file amended United States Nonresident Alien Income Tax Returns for the years 1973 and 1974 so as to treat the amounts paid to Beacon for the furnishing of Boulez' artistic services in the United States as if they had been paid directly to Boulez and as constituting

gross income of Boulez. McGowan agreed in return that past years (i.e., 1971 and 1972) would remain as filed and no further action or payments on Boulez' part would be required, or adjustments made, with respect to any years prior to 1973, and further agreed that no penalties would be asserted with respect to the late filing of tax returns and late payment of additional income tax for the years 1973 and 1974.

In reliance upon said promises of McGowan, Boulez fulfilled the promises made on his behalf as follows:

(a) On May 4, 1976, he terminated his agreement with Beacon as of July 1, 1975, personally assumed the obligations imposed on Beacon by its contract with the Philharmonic, and rendered himself personally liable to the Philharmonic for any breach of such obligations;

(b) He did not challenge the Internal Revenue Service with respect to, or contest the inclusion in his gross income for the year 1973 and subsequent thereto of, the amounts paid to Beacon for the furnishing of his artistic services in the United States;

(c) He did not challenge the Internal Revenue Service with respect to, or contest the applicability to him of, Rev. Rul. 74-330, 1974-2 C.B. 278, and Rev. Rul. 74-331, 1974-2 C.B. 282, in which the respondent set forth his position regarding foreign entertainers and loan-out arrangements;

(d) He did not, with regard to the payments to Beacon, challenge the respondent with respect to, or contest the applicability to him of, the provisions of the United States-United Kingdom Income Tax Convention or any other income tax convention;

(e) He filed amended 1973 and 1974 United States Nonresident Alien Income Tax Returns on February 2,

1977, reporting as his gross income the amounts paid to Beacon or to him for the furnishing of his artistic services in the United States to the Philharmonic and paid the additional income tax due thereon; and

(f) He refrained from filing any claims for refund of tax paid in accordance with the agreement.

The issues presented for decision are whether (1) the assumed agreement constituted a binding compromise within the meaning of section 7122,[1] which respondent breached by issuing the notice of deficiencies involved herein, and (2) in any event, respondent is estopped from asserting those deficiencies against the petitioner. The parties are in agreement that if these questions are answered in the negative, the petitioner's motion should be denied and the Court may enter a decision for respondent in respect of the deficiencies set forth in the notice of deficiency.[2] Otherwise, the parties have stipulated that if petitioner's motion should be granted, there should be a trial limited to the issue of whether an agreement was concluded between Moskovitz (on behalf of petitioner) and McGowan (on behalf of respondent), with decision entered in favor of petitioner or

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1 Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954 as amended and in effect during the taxable years at issue.

2 Petitioner has stipulated that, in such event, the amounts of gross income as determined by respondent in his notice of deficiency are correct. There is an adjustment, in respect of U.S. income tax withheld at source, which the parties expect to agree upon or, if not, can be disposed of under Rule 155, Tax Court Rules of Practice and Procedure.

respondent depending upon the Court's resolution of that issue.

Initially, the parties lock horns as to whether 7122 authorizes an *oral* agreement of compromise.[3]

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[3] Sec. 7122 provides:

SEC. 7122. COMPROMISES

(a) AUTHORIZATION -- The Secretary or his delegate may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.

(b) RECORD -- Whenever a compromise is made by the Secretary or his delegate in any case, there shall be placed on file in the office of the Secretary or his delegate the opinion of the General Counsel for the Department of the Treasury or his delegate, with his reasons therefor, with a statement of--

(1) The amount of tax assessed,

(2) The amount of interest, additional amount, addition to the tax, or assessable penalty, imposed by law on the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise.

Notwithstanding the foregoing provisions of this

Petitioner contended that is does, drawing support for that position from the fact that section 7121, dealing with closing agreements, specifically refers to "an agreement in writing," while section 7122 contains no such qualifying language. Respondent contends that section 7122 requires a written agreement. The issue is one that has never been squarely faced by any court[4] and, for reasons hereinafter set forth, we find it unnecessary to resolve it herein. We are constrained to note however, that: (1) There is an indication - albeit

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subsection, no such opinion shall be required with respect to the compromise of any civil case in which the unpaid amount of tax assessed (including any interest, additional amount, addition to the tax, or assessable penalty) is less than $500.

4 *Botany Mills v. United States*, 278 U.S. 282, 289 (1929), affg. 63 Ct. Cl. 405 (1927), which applied the early predecessor of sec. 7121 (Act of July 20, 1968, ch. 186, sec. 102, 15 Stat. 166, Rev. Stat. sec. 3229), refers to an "informal agreement" (or "gentleman's agreement," see 63 Ct.Cl. at 420) which appears to have ben oral, see *Rubel Corp. v. Rasquin*, 43 F.Supp. 111, 118 (E.D. N.Y. 1942), but neither the Court of Claims nor the Supreme Court addressed the issue. In *McIlhenny v. Commissioner*, 39 F.2d 356 (3d Cir. 1930), affg. 13 B.T.A. 288 (1928), also involving Rev. Stat. sec 3229, the opinion of the Court of Appeals makes a passing reference to the fact that "there was no agreement in writing" but adds the words "or otherwise." *Country Gas Service, Inc. v. United States*, 405 F.2d 147 (1s Cir. 1969), involved an oral agreement in the context of sec. 7122, but the case was decided on the lack of authority of an internal revenue agent without any discussion of the oral agreement point.

peripheral - in the legislative history of an analogous provisions dealing with compromises (Act of March 3, 1863, ch. 76, sec. 10, 12 Stat. 740, enacting Rev. Stat. sec. 3469) that a written agreement was contemplated by the Congress. See J. Seidman, Legislative History of Federal Income Tax Laws 1938-1861, at 1060 (1938); (2) it does not follow from the fact that section 7121 specifically refers to "an agreement in writing" that interpreting section 7122 to impose such a requirement would necessarily be invalid; and (3) respondent's regulations specifically require a written offer and acceptance, secs. 301.7122-1(d) and 601.203(a) and (b), Proced. & Admin. Regs., and we would hesitate to hold these regulations invalid. Boske v. Comingore, 177 U.S. 459 (1900); see *Commissioner v. South Texas Lumber Co.*, 333 U.S. 496 (1948); cf. *Accardi v. Shaughnessy*, 347 U.S. 260, 265-266 (1954).

As we see it, the real issue is whether, irrespective of the scope of section 7122 insofar as an oral agreement is concerned, McGowan (as Director of the Office of International Operations) had authority to enter into an oral compromise. Resolution of this question requires an analysis of the source and scope of his authority. Delegation Order No. 32 (Rev. 1), 1970-2 C.B. 487, gave the Director of International Operations the same authority as a District Director of Internal Revenue "under provisions of Treasury Regulations" in administering and directing the functions of the Office of International Operations.[5] Delegation Order No. 11 (Rev. 6), 1971-1 C.B. 653, delegated to the Director of International Operations, as well as District Directors and certain other officials, authority "under section 7122 of the Internal Revenue Code, to accept offers in com-

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5 Announcement of the establishment of the Office of International Operations was made by Rev. Proc. 55-2, 1955-2 C.B. 898.

promise," subject to monetary and other limitations not relevant herein. Rev. Proc. 64-44, 1964-2 C.B. 974, specifically refers to Delegation Order No. 11 (Rev. 3), 1963-2 C.B. 732, and states that "This is a 'limited' delegation to the extent that the delegated authority must be exercised in accordance with the limitations prescribed by section 301.7122-1 of the Regulations on Procedure and Administration."[6]

As we have already pointed out (see p. 212 *supra*), section 301.7122-1(d), Proced & Admin. Regs., specifically requires a written offer and acceptance.

Petitioner seeks to avoid the clear impact of the foregoing by asserting that his counsel "went to the one person in the Office of the International Operations, its Director, *whom he knew to be a solid, sound and reliable official* of long-time service in the I.R.S. *having authority to bind the Commissioner*" (Emphasis added). We find it hard to understand how such counsel could have *known* that McGowan had authority to conclude an oral compromise agreement in light of the clear import of the above-mentioned delegation orders, revenue procedure, and regulations. At best, such counsel may have assumed that McGowan had such authority (see

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6 While Delegation Order No. 11 (Rev. 3) contained language similar to that set forth in Rev. Proc. 64-44, namely, that the delegation was "Subject to limitations contained in applicable regulations and procedures," and Delegation Order (Rev. 6) does not contain such language, we attach no significance to such omission; in light of the clear reference to the limitations prescribed by sec. 301.7122-1, Proced. & Admin. Regs., set forth in Rev. Proc. 64-44, repetition of that language in subsequent revisions of Delegation Order No. 11 would have been superfluous.

Baker v. Commissioner, 24 T.C. 1021, 1024 (1955)), but this is simply not enough to confer the necessary authority on McGowan. It has long been settled that "persons dealing with an agent of the government must take notice of the limitations of his authority." *Bornstein v. United States*, 170 Ct. Cl. 576, 582, 345 F.2d 558, 562 (1965); see *Smale & Robinson, Inc. v. United States*, 123 F. Supp. 457, 465 (S.D. Cal. 1954); *Graff v. Commissioner*, 74 T.C. 743, 762 (1980); *Midwest Motor Express, Inc. v. Commissioner*, 27 T.C. 167, 182 (1956), affd. 251 F.2d 405 (8th Cir. 1958). We hold that McGowan lacked the necessary actual or apparent[7] authority to conclude a binding oral compromise agreement.[8]

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7 Petitioner's reliance on Delegation Order No. 77 (Rev. 8), 1975-1 C.B. 636, as giving McGowan apparent authority, is totally misplaced. That order dealt only with the authority to issue deficiency notices.

8 In view of this holding, we find it unnecessary to consider a further argument of respondent that the requirement of sec. 7122(b), namely, that an opinion of the General Counsel of the Treasury be filed, was not met. There appears to be some difference of judicial opinion as to whether this requirement is mandatory or directory. See *Botany Mills v. United States, supra; Hamilton v. United States*, 163 Ct. Cl. 116, 123-124, 324 F.2d 960, 964 (1983); *Hanby v. Commissioner*, 67 F.2d 125, 129 (4th Cir. 1933), affg. 26 B.T.A. 670 (1932); *Backus v. United States*, 75 Ct. Cl. 69, 59, F.2d 242, 256 (1932). See also 301.7122-1(e), Proced. & Admin. Regs. We further note that, unlike its predecessors, sec. 7122 no longer requires the personal approval of the Secretary of the Treasury.

Petitioner further asserts that, even though there may not have been a binding compromise agreement between McGowan and himself, respondent is nevertheless equitably estopped from asserting the deficiencies herein because petitioner relied on what he thought was an agreement of compromise and changed his position to his detriment. He points to the following language in *Botany Mills v. United States*, 278 U.S. 282, 289 (1929): "And, without determining whether such an agreement [compromise], though not binding in itself, may when executed become, under some circumstances, binding on the parties." Respondent argues that petitioner has not shown the necessary elements to justify invoking equitable estoppel.

We start from the premise that the doctrine of equitable estoppel is applied against the Government "with the utmost caution and restraint." See *Estate of Emerson v. Commissioner*, 67 T.C. 612, 617-618 (1977), and cases cited thereat. See also *Graff v. Commissioner, supra* at 761-762. The courts have set forth several conditions which come into play in determining whether such doctrine should be so applied. See *Lignos v. United States*, 439 F.2d 1365, 1368 (2d Cir. 1971); *Estate of Emerson v. Commissioner, supra*. A key condition is detrimental reliance by the party claiming the benefit of the doctrine on the action of the Government. See *Hudock v. Commissioner*, 65 T.C. 351, 363 (1975). It is to this condition that we turn our attention. See *Graff v. Commissioner, supra*.

Our findings of fact (see pp. 210-211 *supra*) set forth the actions which petitioner took in reliance on the oral agreement.[9]

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9 Respondent has conceded the existence of an oral agreement solely for the purpose of this motion (see p. 209 *supra*), but has not similarly limited his

We fail to see how the fact that petitioner terminated his agreement with Beacon and directly assumed the obligations imposed by Beacon's contract with the New York Philharmonic constituted the requisite detrimental reliance. It appears to us that petitioner simply substituted an equivalent obligation to perform services, the only difference being a change in the obligee.

We reach a similar conclusion with respect to the fact that petitioner did not contest the inclusion in his gross income for 1973 and subsequent years of any amounts paid to Beacon for the furnishing of artistic services by him in the United States. The short answer is that, at the time the deficiency notice herein was issued on May 5, 1978, in breach of the compromise agreement and indeed when the petition herein was filed (it was mailed in an envelope postmarked July 26, 1978), neither the 2-year period for filing a claim for refund for the amounts paid on February 2, 1977, in respect of 1973 and 1974 nor the 3-year period in respect of subsequent years had expired. Sec. 6511(a). The mere fact that petitioner included amounts in his gross income and paid taxes thereon which he might otherwise have not so included or so paid is not, in our opinion, a sufficient detriment to warrant the application of equitable estoppel. Petitioner's reliance upon the agreement may have caused him to lose his ability to contest the merits of his claims in *this* Court (because his payment precluded the respondent from issuing a notice of deficiency, such notice being a statutory prerequisite to our jurisdiction, see sec. 6213(a)), but it did not prevent

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stipulation as to elements of reliance set forth in the affidavit of Moskovitz in support of petitioner's motion and which are stated by Moskovitz to be "a complete enumeration" of petitioner's reliance.

petitioner from litigating the issue of taxability in other forums.

Any claim by petitioner that he put himself in a worse position with respect to taxability of amounts paid for his services to the Philharmonic because they were paid to him directly from a source within the United States and thus may have inhibited his ability to claim, by way of a suit for refund for 1973 and 1974, whatever benefits might have been derived from the continued existence of a "loan-out" arrangement between Beacon and the Philharmonic is undercut by his concession herein that, absent a binding compromise agreement or estoppel, he is liable for the deficiencies asserted herein for 1971 and 1972 when the "loan-out" arrangement was in existence.[10] Similar reasoning disposes of the other acts of reliance asserted by petitioner.

The long and the short of the matter is that we conclude that the acts of reliance by petitioner do not involve the level of detriment necessary to bring the instant case within the category of those "rare instances" where respondent should be estopped. See *Estate of Emerson v. Commissioner, supra* at 618.

The cases relied upon by petitioner are all distinguishable: *Miller v. United States*, 500 F.2d 1007 (2d Cir. 1974) (respondent had led the taxpayer to believe that a filing deadline, and therefore the running of the period of limitations, had been extended); *Shuster v. Commissioner*, 312 F.2d 311 (9th Cir. 1962), affg. 32 T.C.

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10 Nothing in this opinion should be construed to represent any expression of our views as to whether the existence of the "loan-out" arrangement had any substantive effect on petitioner's tax liability. Indeed, the petitioner has not articulated any reasons for any such effect.

998 (1959), and revg. 32 T.C. 1017 (1959) (bank held not liable for estate taxes where, after an audit, it had distributed the assets of a trust later held to be includable in the gross estate at a time when the bank would have had no remedy because of the running of the period of limitations); *Vestral v. Commissioner*, 152 F.2d 132 (D.C. Cir. 1945), revg. 4 T.C. 558 (1945) (respondent was seeking to collect a tax which had already been collected from another taxpayer who was barred by the period of limitations from obtaining a refund); *Backus v. United States*, 75 Ct. Cl. 69, 59 F2d 242 (1932) (stipulated court decision involved, see *Baker v. Commissioner*, 24 T.C. at 1024-1025); *Interstate Fire Insurance Co. v. United States*, 215 F.Supp. 586 (E.D. Tenn. 1963), affd. 339 F.2d 603 (6th Cir. 1964) (taxpayer had, at great expense, reallocated certain expenses under sec. 482 as the result of an audit and respondent later changed his mind because the reallocation produced a lesser tax); *Smale & Robinson, Inc. v. United States, supra* (involved a procedural issue as to whether an amendment to a claim for refund, to set forth a new ground after the period of limitations had expired, should be permitted).

Petitioner's motion for summary judgment will be denied and, as a consequence, pursuant to the stipulation of the parties,

Decision will be entered under Rule 155.

APPENDIX C

ORDER OF UNITED STATES TAX COURT

UNITED STATES TAX COURT

WASHINGTON

PIERRE BOULEZ,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 8902-78
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
	)	
Respondent.	)	

ORDER

The Court having, on February 4, 1981, issued an Opinion in the above-docketed case and petitioner having mailed to the Court, on March 6, 1981 (within 30 days of the service of the Opinion), a Motion for Reconsideration of Opinion (which was received and filed by the Court on March 9, 1981), in which he asked that petitioner's previously filed motion for summary judgment be granted, for the reasons appearing in the Memorandum Sur Order of even date with this Order, it is

ORDERED that petitioner's Motion for Reconsideration of Opinion is hereby denied.

/s/
Judge

Appendix C

Dated: Washington, D.C.
March 11, 1981

UNITED STATES TAX COURT

WASHINGTON

PIERRE BOULEZ,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 8902-78
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
	)	
Respondent.	)	

MEMORANDUM SUR ORDER

Petitioner's arguments in support of his motion for reconsideration of opinion and for the granting of his motion for summary judgment are totally without merit.

In the first place, he contends that the Court was incorrect in attaching no significance to the omissions of certain limiting language from Delegation Order No. 11 (Rev. 6). See slip opinion pp. 9-10, and particularly footnote 6. In essence, petitioner's argument is that the omission of language from a Delegation Order constitutes a license to the Director of International Operations to ignore the specific requirements of respondent's regulations and revenue procedures. This argument is absurd on its face.

In the second place, petitioner refers to other early legislative history (Act of July 20, 1868, ch. 186, sec. 102, 15 Stat. 166, and Act of June 20, 1874, enact-

ing Rev. Stats. sec. 3229) to counteract the Court's reference to the Act of March 3, 1963. See slip opinion p. 8. As petitioner himself points out, such other legislative history dealt with an entirely separate issue--the requirement of written advice and consent of the solicitor of internal revenue, which requirement was eliminated in its entirety and the approval of the Secretary of the Treasury substituted therefor. Moreover, although the statute did not so specify, the legislative history shows that the "written assent of the Secretary of the Treasury" was contemplated. See J. Seidman's Legislative History of the Federal Income Tax Laws, 1938-1861, at 1059 (1938). Finally, the Court made reference to the Act of March 3, 1963, only after it had expressly refused to decide whether section 7122 required a written agreement. In point of fact, the Court's position, as very clearly set forth in its opinion, is that the language of section 7122 permits the interpolation by the respondent of the requirement of a written agreement and that respondent having made such interpolation by way of regulations and a revenue procedure, the authority of the Director of International Operations was correspondingly circumscribed.

/s/
Judge

Dated: Washington, D.C.
March 11, 1981

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1048

September Term, 1986

PIERRE BOULEZ

—v.—

COMMISSIONER OF INTERNAL REVENUE

Before:
WALD, *Chief Judge*; ROBINSON, *Circuit Judge*;
and WRIGHT, *Senior Circuit Judge.*

ORDER

Upon consideration of appellant's petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam

For The Court:
GEORGE A. FISHER, *Clerk*

By: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

[UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

FILED APR 14 1987
GEORGE A. FISHER, *Clerk*]

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1048

September Term, 1986

PIERRE BOULEZ

—v.—

COMMISSIONER OF INTERNAL REVENUE

Before:

WALD, *Chief Judge*; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORR, STARR, SILBERMAN, BUCKLEY, WILLIAMS, and D.H. GINSBURG, *Circuit Judges.*

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full court. No member of the court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellant's suggestion is denied.

Per Curiam

For The Court:
GEORGE A. FISHER, *Clerk*

By: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

[UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

FILED APR 14 1987
GEORGE A. FISHER, *Clerk*]

APPENDIX E

TREASURY DEPARTMENT REGULATIONS

301.7122-1 Compromises.

(a) In general. Except with respect to certain criminal liabilities arising under the internal revenue laws relating to narcotics, smoking opium, and marihuana, the Commissioner may compromise any civil or criminal liability arising under the internal revenue laws prior to the reference of a case involving such liability to the Department of Justice for prosecution or defense. Any such liability may be compromised only upon one or both of the following grounds:

(1) Doubt as to liability; or

(2) Doubt as to collectibility.

No such liability will be compromised if the liability has been established by a valid judgment or is certain, and there is no doubt as to the ability of the Government to collect the amounts owing with respect to such liability.

(b) Scope of compromise agreement. A compromise agreement may relate to a civil or criminal liability for taxes, interest, ad valorem penalties, or specific penalties. However, a criminal liability may be compromised only if it involves a violation of a regulatory provision of the Code, or a related statute, and then only if such violation was not deliberately committed with an intent to defraud.

(c) Effect of compromise agreement. A compromise agreement relates to the entire liability of the taxpayer (including taxes, ad valorem penalties, and interest) with respect to which the offer in compromise is submitted and all questions of such liability are con-

clusively settled thereby. Specific penalties, however, shall be compromised separately and not in connection with taxes, interest, or ad valorem penalties. Neither the taxpayer nor the Government shall, upon acceptance of an offer in compromise, be permitted to reopen the case except by reason of (1) falsification or concealment of assets by the taxpayer, or (2) mutual mistake of a material fact sufficient to cause a contract to be reformed or set aside. However, acceptance of an offer in compromise of a civil liability does not remit a criminal liability, nor does acceptance of an offer in compromise of a criminal liability remit a civil liability.

(d) Procedure with respect to offers in Compromise--

(1) Submission of offers. Offers in compromise shall be submitted on forms prescribed by the Internal Revenue Service which may be obtained from district directors of internal revenue, and should generally be accompanied by a remittance representing the amount of the compromise offer or a deposit if the offer provides for future installment payments. If the final payment on an accepted offer is contingent upon the immediate or simultaneous release of a tax lien in whole or in part, such payment must be in cash, or in the form of a certified, cashier's, or treasurer's check drawn on any bank or trust company incorporated under the laws of the United States or any State, Territory, or possession of the United States, or by a U.S. postal, bank, express, or telegraph money order.

(2) Stay of collection. The submission of an offer in compromise shall not automatically operate to stay the collection of any tax liability. However, enforcement of collection may be deferred if the interests of the United States shall not be jeopardized thereby.

(3) Acceptance. An offer in compromise shall be considered accepted only when the proponent

thereof is so notified in writing. As a condition to accepting an offer in compromise, the taxpayer may be required to enter into any collateral agreement or to post any security which is deemed necessary for the protection of the interests of the United States.

(4) Withdrawal or rejection. An offer in compromise may be withdrawn by the proponent at any time prior to its acceptance. In the event an offer is rejected, the proponent shall be promptly notified in writing. Frivolous offers or offers submitted for the purpose of delaying the collection of tax liabilities shall be immediately rejected. If an offer in compromise is withdrawn or rejected, the amount tendered with the offer, including all installments paid, shall be refunded without interest, unless the taxpayer has stated or agreed that the amount tendered may be applied to the liability with respect to which the offer was submitted.

(e) Record. Except as otherwise provided in this paragraph, if an offer in compromise is accepted, there shall be placed on file the opinion of the Chief Counsel for the Internal Revenue Service with respect to such compromise, with his reasons therefor, and including a statement of--

(1) The amount of tax assessed,

(2) The amount of interest, additional amount, addition to the tax, or assessable penalty, imposed by law on the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise.

However, no such opinion shall be required with respect to the compromise of any civil case in which the unpaid amount of tax assessed (including any interest, addition-

al amount, addition to the tax, or assessable penalty) is less than $500.

. . . .

601.203 Offers in Compromise.

(a) General. (1) The Commissioner may compromise, in accordance with the provisions of section 7122 of the Code, any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense. Certain functions of the Commissioner with respect to compromise of civil cases involving liability of $100,000 or more, based solely on doubt as to liability, have been delegated to regional commissioners and, for cases arising in the Office of International Operations, to the Assistant Commissioner (Compliance). The authority concerning liability of $100,000 or more based on doubt as to collectiblity or doubt as to both collectiblity and liability has been delegated to the Director, Collection Division and regional commissioners. The authority with respect to compromise of civil cases involving liability under $100,000, and of certain specific penalties has been delegated to district directors, assistant district directors, the Director of International Operations, the Assistant Director of International Operations, regional directors of Appeals, and chiefs and associate chiefs, Appeals offices. The authority concerning offers in compromise of penalties based solely on doubt as to liability, if the liability is less than $100,000, has also been delegated to service center directors and assistant service center directors. In civil cases involving liability of $500 or over and in criminal cases the functions of the General Counsel are performed by the Chief Counsel for the Internal Revenue Service. In certain cases these functions are performed in the National Office and in other cases by Regional Counsel. (See also paragraph (c) of this section.) In cases arising under

chapters 51, 52, and 53 of the Code, offers are acted upon by the Bureau of Alcohol, Tobacco and Firearms. (See 601.327.)

(2) An offer in compromise of taxes, interest, ad valorem penalties, or specific penalties may be based on either inability to pay or doubt as to liability. Offers in compromise arise usually when payments of assessed liabilities are demanded, ad valorem penalties for delinquency in filing returns are asserted, or specific civil or criminal penalties are incurred by taxpayers. A criminal liability will not be compromised unless it involves only the regulatory provisions of the Internal Revenue Code and related statutes. However, if the violations involving the regulatory provisions are deliberate and with intent to defraud, the criminal liabilities will not be compromised.

(b) Use of prescribed form. Offers in compromise are required to be submitted on Form 656, property executed, and accompanied by a financial statement on Form 433 (if based on inability to pay). Form 656 is used in all cases regardless of whether the amount of the offer is tendered in full at the time the offer is filed or the amount of the offer is to be paid by deferred payment or payments. Copies of Form 656 and Form 433 may be obtained from district directors. An offer in compromise, should be filed with the district director or service center director.

(c) Consideration of Offer.

. . . .

(3) The district directors, assistant district directors, Director of International Operations, Assistant Director of International Operations, service center directors, assistant service center directors, and chiefs, accounting and adjustment divisions are authorized to reject any offer in compromise referred for their consi-

deration. Unacceptable offers considered by the Chief Counsel, regional counsel, or the Appeals office are also rejected by the district directors or Director of International Operations, as applicable. If an offer is not acceptable, the taxpayer is promptly notified of the rejection of that offer. If an offer is rejected, the sum submitted with the offer is returned to the proponent, unless the taxpayer authorizes application of the sum offered to the tax liability. A selective post review of offers rejected by a district director involving liabilities totaling $5,000 or more is made by each regional commissioner. A selected post review of offers rejected by the Director of International Operations involving liabilities totaling $5,000 or more is made by the National Office.

(4) If an offer involving unpaid liability of $100,000 or more is considered acceptable by the office having jurisdiction over the offer, a recommendation for acceptance is forwarded to the National Office for review. If the recommendation for acceptance is approved, the offer is forwarded to the Office of the Chief Counsel for approval. After approval by the Office of the Chief Counsel, it is forwarded to the Commissioner for acceptance. The taxpayer is notified of the acceptance of the offer in accordance with its terms. Acceptance of an offer in compromise of civil liabilities does not remit criminal liabilities, nor does acceptance of an offer in compromise of criminal liabilities remit civil liabilities.

(d) Conferences. Before filing a formal offer in compromise, a taxpayer may request a meeting in the office which would have jurisdiction over the offer to explore the possibilities of compromising unpaid tax liability. After all investigations have been made, the taxpayer may also request a meeting in the office having jurisdiction of the offer to determine the amount which may be accepted as a compromise. If agreement is not reached at such meeting and the district director

has processing jurisdiction over the offer, the taxpayer will be informed that the taxpayer may request consideration of the case by an Appeals Office. The request may be in writing or oral. If the tax, penalty, and assessed (but not accrued) interest sought to be compromised exceeds $2,500 for any return, taxable year or taxable period, a written protest is required. Taxpayers and their representatives are required to comply with the applicable conference and practice requirements. See Subpart E of this part.

APPENDIX F

REVENUE PROCEDURES

Rev. Proc. 64-44

Section 1. PURPOSE

The purpose of this Revenue Procedure is to set forth the jurisdictional changes pertaining to the consideration and disposition of offers in compromise under Delegation Order No. 11 (Rev. 3), C.B. 1963-2, 732; to outline general guidelines relating to the acceptability of an offer in compromise; and also to supersede and restate in a current document the practices and procedures set forth in prior Revenue Procedures applicable to comparable positions and organizational components.

Sec. 2. DECENTRALIZED AREAS OF RESPONSIBILITY.

.01 District Directors. Certain functions of the Commissioner of Internal Revenue with respect to the compromise of civil cases involving liabilities under $100,000 and of specific penalties--incurred under the regulatory provisions of the Internal Revenue Codes of 1954 and 1939 and related statutes--have been delegated to District Directors of Internal Revenue under Delegation Order No. 11 (Rev. 3). This is a "limited" delegation to the extent that the delegated authority must be exercised in accordance with the limitations prescribed by section 301.7122-1 of the Regulations on Procedure and Administration and with procedures established by the National Office. See section 3 herein with respect to offers excepted from the District Directors' delegated authority.

. . . .

Appendix F

Sec. 3. LIMITATIONS ON DELEGATED AUTHORITY.

Regardless of the amount of liability involved, District Directors and Regional Counsel have not been delegated authority to accept offers in compromise in the following classes:

.01 All cases in which recommendations for prosecution are pending in the Intelligence Division of the District Director's office, in the Chief Counsel's office, the Department of Justice, or offices of United States Attorneys, including cases in which criminal proceedings a have been instituted but not disposed of and also related cases in which offers in compromise have been submitted. See section 2.03(3)1 above.

.02 All cases in which the acceptance of an offer by the Internal Revenue Service is dependent upon the acceptance of a related offer or upon a settlement under the jurisdiction of the Department of Justice.

.03 All cases arising under laws relating to alcohol, tobacco and firearms taxes.

.04 Certain narcotic cases. See Rev. Rul. 55-153, C.B. 1955-1, 199.

. . . .

Sec. 5. DISTRICT DIRECTOR AUTHORIZED TO REJECT AND PROCESS WITHDRAWN OFFERS.

The District Director, regardless of the liability amount involved, is authorized to reject and, subject to the appeal procedure prescribed by section 6 of this Revenue Procedure and limitations set forth in this section, finally close--by written notification to the offeror--all compromise cases wherein the offers are not acceptable or have been withdrawn, except certain narcotic offers (see Rev. Rul. 55-153) and those arising

under laws relating to alcohol, tobacco and firearms. With respect to Chief Counsel cases processed by Regional Counsel, the District Director's rejection authority is limited and consists of signing the rejection (or withdrawal) letter and memorandum prepared by Regional Counsel and the mailing of the letter to the offeror.

Sec. 7. SCOPE OF DELEGATED ACCEPTANCE AUTHORITY.

.01 Liabilities under $500.-Except as provided in section 3 above, the District Director is delegated final authority to accept offers in cases under his processing jurisdiction wherein the unpaid amount of tax, including any interest, additional amount, additions to the tax or assessable penalty is less than $500. See also section 7.03 below. Under the provisions of section 7122(b) of the Code, no legal opinion is required in these cases.

.02 Liabilities of $500 or more but less than $100,000 and specific penalties.-Except as provided in sections 2.02 and 3 above, the District Director with the approval of Regional Counsel is delegated authority to accept an offer which involves a liability (including any interest, additional amounts, additions to the tax, or assessable penalties) of $500 or more, but less than $100,000, or is in compromise of a specific penalty. The documentation for acceptance is prepared by the District Director and the case is forwarded to Regional Counsel for the legal opinion required under section 7122(b) of the Code. If the Regional Counsel considers the offer acceptable, he is authorized to sign the appropriate document which constitutes the legal opinion. The file is returned to the District Director for his signature on the Abstract and Statement and issuance of the acceptance letter.

. . . .

Appendix F

Sec. 8. GENERAL GUIDELINES RELATING TO THE ACCEPTABILITY OF AN OFFER IN COMPROMISE.

The compromise of a tax liability rests upon but one or both of two grounds-(1) doubt as to liability and (2) doubt as to collectibility. The doubt as to liability must be supported by evidence and the amount acceptable will depend upon the degree of doubt found in the particular case. Where doubt as to collectiblity is involved, the offer must reflect all that can be collected from a taxpayer's assets and his income, present or prospective, after giving effect to all priorities granted to the Government. The determination of the acceptability of such an offer, however, is dependent on many factors, and consideration must be given to all sources of collection open to the Government, and also to assets or income which are available to the taxpayer but beyond the reach of the Government. Where the liability sought to be compromised is substantial or fraud elements are involved, added consideration is usually required for the acceptance of offers based in whole or in part on inability to pay. The added consideration required is dependent upon the facts in the particular case, but generally is provided for by the submission of collateral agreements. The agreements most commonly employed pertain to payments from future income and, where applicable, to the relinquishment of certain present or potential tax benefits.

Rev. Proc. 80-6

Section 1. PURPOSE

The purpose of this revenue procedure is to set forth the jurisdictional changes pertaining to the consideration and disposition of offers in compromise under Delegation Order No. 11 (Rev. 11), 1979-2 C.B. 481; to outline general guidelines relating to the acceptability of an offer in compromise; and also to supersede and

restate in a current document the practices and procedures set forth in prior revenue procedures applicable to comparable positions and organizational components.

Sec. 2. DECENTRALIZED AREAS OF RESPONSIBILITY.

.01 Certain functions of the Commissioner of Internal Revenue with respect to the compromise of civil cases involving doubt as to liability or collectibility, incurred under the regulatory provisions of the Internal Revenue Code and related statutes have been delegated under Order No. 11 (Rev. 11) as follows:

1. Assistant Commissioner (Compliance), for cases originating in the Office of International Operations, and Regional Commissioners.--Delegated authority to accept, under section 7122 of the Code, compromises of civil cases involving tax liabilities of $100,000 or more (including any interest, penalty, additional amount or addition to tax) based solely upon doubt as to liability. This authority may not be redelegated.

2. Director, Collection Division and Regional Commissioners.--Delegated authority to accept, under section 7122, compromises of civil cases involving liabilities of $100,000 or more (including any interest, penalty, additional amount or addition to tax) based on doubt as to collectibility or doubt as to both collectibility and liability and offers submitted under section 3469 of the Revised Statutes, as amended (31 U.S.C. 194) insofar as claims arising in the administration of the Internal Revenue laws are concerned. This authority may not be redelegated.

3. District Directors, the Director of International Operations, Assistant District Directors and the Assistant Director of International Operations.--Delegated authority to accept, under section 7122, compromises of civil cases involving liabilities under $100,000 (including any interest, penalty, additional

amount or addition to the tax), to accept offers involving specific penalties, and reject offers to compromise civil cases (subject to the appeal procedures prescribed by section 6 of this revenue procedure) regardless of the amount of the liability involved. This authority may not be redelegated except that the authority to reject offers may be redelegated, but not lower than to Division Chief. The District Director in a streamlined district may not redelegate this authority. In addition, those Service officials delegated rejection authority are authorized to close, regardless of the amount of the liability involved, by written notification to the offeror, all compromise cases where the offer has been withdrawn.

4. Regional Directors of Appeals, Chiefs and Associate Chiefs, Appeals Offices.--Delegated authority to accept, under section 7122, compromises of civil cases involving liabilities under $100,000 (including any interest, penalty, additional amount or addition to the tax), to accept offers involving specific penalties, and reject offers to compromise civil cases regardless of the amount of the liability involved. This authority may not be redelegated.

5. Service Center Directors and Assistant Service Center Directors.--Delegated authority to accept, under section 7122, compromises of civil cases under $100,000 involving penalty liabilities based solely on doubt as to liability, and reject offers in compromise, limited to penalties (subject to the appeal procedures prescribed by section 6 of this revenue procedure), regardless of the amount of the liability involved. This authority may be redelegated, but not lower than to Division Chief. In addition, those Service officials delegated rejection authority are authorized to close, regardless of the amount of the liability involved, by written notification to the offeror, all compromise cases where the offer has been withdrawn.

The above delegations are "limited" to the extent that the delegated authority must be exercised in accordance with the limitations prescribed by section 301.7122-1 of the Regulations on Procedure and Administration and with procedures established by the National Office. See section 3 with respect to offers excepted from this delegated authority.

. . . .

Sec. 8. EFFECT ON OTHER DOCUMENTS.

Rev. Proc. 64-44, 1964-2 C.B. 974, and Rev. Proc. 66-53, 1966-2 C.B. 1266, are superseded.

APPENDIX G

TREASURY DEPARTMENT ORDER AND DELEGATION ORDERS

Treasury Department Order

TREASURY DEPARTMENT ORDER 150-60

COMMISSIONER OF INTERNAL REVENUE AND CHIEF COUNSEL FOR INTERNAL REVENUE SERVICE

Delegation of authority regarding certain functions.

By virtue of the authority vested in me by reorganization plan No. 26 of 1950, there are hereby transferred to the Commissioner of Internal Revenue the functions of the Secretary of the Treasury, and to the Chief Counsel for the Internal Revenue Service the functions of the General Counsel for the Department of the Treasury, under section 3469 of the Revised Statutes, as amended (31 U.S.C. 194), insofar as claims arising in the administration of the internal revenue laws are concerned.

The Commissioner or the Chief Counsel may, in such manner as he shall from time to time direct, delegate to his subordinates any function transferred to him by this order.

Dated: June 3, 1964
[Seal]

DOUGLAS DILLON,
Secretary of the Treasury.

Appendix G

COMMISSIONER DELEGATION ORDER NO. 11

(Effective December 2, 1955)

(20 F.R. 9870)

Delegation of authority to accept certain offers in compromise.

Pursuant to authority vested in me by Treasury Department Order No. 150-25, dated June 1, 1953, District Directors of Internal Revenue are hereby delegated authority to accept offers in compromise submitted under the provisions of section 3761 of the Internal Revenue Code of 1939, or section 7122 of the Internal Revenue Code of 1954, in cases in which the unpaid amount of the tax (including any interest, additional amount, addition to the tax, or assessable penalty) is less than $5,000, and in cases involving specific penalties, except that this delegation or authority is subject to the limitations contained in applicable regulations and procedures.

O. GORDON DELK,
Acting Commissioner.

Appendix G

DELEGATION ORDER NO. 11 (Rev. 3)

(Effective July 1, 1963)

Delegation of authority to accept certain offers in compromise.

Pursuant to the authority vested in me by Treasury Department Order No. 150-25, dated June 1, 1953 [18 F.R. 3238], it is hereby ordered:

1. Subject to the limitations contained in applicable regulations and procedures, District Directors are delegated authority, under section 7122 of the Internal Revenue Code, to accept offers in compromise in cases in which the liability sought to be compromised (including any interest, additional amount, addition to the tax, or assessable penalty) is less than $100,000, and any offers involving specific penalties.

2. This authority may not be redelegated.

3. This Order supersedes Delegation Order No. 11 (Rev. 2) issued December 29, 1961 [C.B. 1962-1, 396].

MORTIMER M. CAPLIN,
Commissioner.

Appendix G

DELEGATION ORDER NO. 11 (Rev. 4)

(Effective March 28, 1968)

Delegation of authority to accept or reject offers in compromise.

Pursuant to the authority vested in the Commissioner of Internal Revenue by Treasury Department Order No. 150-25 dated June 1, 1953 [18 F.R. 3238], as amended by Order No. 180 dated November 17, 1953, and Order No. 150-36 dated August 17, 1954 [C.B. 1954-2, 733], 26 CFR 301.7122-1 and 26 CFR 301.7701-9, it is hereby ordered:

1. District Directors, Assistant District Directors, the Director of International Operations and the Assistant Director of International Operations are delegated authority, under section 7122 of the Internal Revenue Code, to accept offers in compromise in cases in which the liability sought to be compromised (including any interest, additional amount, addition to the tax, or assessable penalty) is less than $100,000, to accept offers involving specific penalties, and to reject offers in compromise regardless of the amount of liability sought to be compromised. This authority does not pertain to offers in compromise of liabilities arising under laws relating to alcohol, tobacco, and firearms taxes.

2. Service Center Directors, Assistant Service Center Directors and Chiefs, Accounting and Adjustment Divisions are delegated authority under section 7122 of the Internal Revenue Code, to accept or reject offers in compromise limited to specific penalties (except those arising under laws relating to alcohol, tobacco, and firearms taxes); ad valorem delinquency penalties relating to employment taxes under Subtitle C of the Internal Revenue Code and ad valorem delinquency penalties relating to excise taxes reportable on Form 720,

Appendix G

Quarterly Federal Excise Tax Return, and Form 2290, Federal Use Tax Return on Highway Motor Vehicles.

3. The authority delegated herein may not be redelegated.

4. This Order supersedes Delegation Order No. 11 (Rev. 3) issued June 14, 1963 [C.B. 1963-2, 732].

SHELDON S. COHEN,
Commissioner

DELEGATION ORDER NO. 11 (Rev. 6)

(Effective May 21, 1971)

Delegation of Authority to Accept or Reject Offers in Compromise.

Pursuant to the authority vested in the Commissioner of Internal Revenue by Treasury Department Order No. 150-25 dated June 1, 1953 [18 F.R. 3238], as amended by Order No. 180 dated November 17, 1953, and Order No. 150-36 dated August 17, 1954 [C.B. 1954-2, 733], 26 CFR 301.7122-1 and 26 CFR 301.7701-9, it is hereby ordered:

1. District Directors, Assistant District Directors, the Director of International Operations and the Assistant Director of International Operations are delegated authority, under section 7122 of the Internal Revenue Code, to accept offers in compromise in cases in which the liability sought to be compromised (including any interest, additional amount, addition to the tax, or assessable penalty) is less than $100,000, to accept offers involving specific penalties, and to reject offers in compromise regardless of the amount of liability sought to be compromised. This authority does not pertain to

offers in compromise of liabilities arising under laws relating to alcohol, tobacco, and firearms taxes. The authority delegated herein may not be redelegated except that the authority to reject offers in compromise based on doubt as to collectibility may be redelegated to the Chief, Collection Division.

. . . .

3. This Order supersedes Delegation Order No. 11 (Rev. 5) issued April 8, 1971 [page 653, this Bulletin].

DEAN J. BARRON,
Acting Commissioner.

DELEGATION ORDER NO. 32 (Rev. 1)

(Effective June 26, 1970)

Authority of Director of International Operations.

There is hereby delegated to the Director of International Operations authority, in administering and directing the functions of the Office of International Operations:

1. To perform those functions vested in the Secretary or his delegate by the Internal Revenue Code of 1954 which may be performed by a District Director of Internal Revenue under provisions of Treasury Regulations or of, and to exercise authorities vested Treasury Decisions; and

2. To perform any other functions in, District Directors of Internal Revenue by Commissioner Delega-

tion Orders, or any other instrument currently in force and effect.

Delegation Order No. 32, issued May 1, 1956 [C.B. 1956-1, 1016], is hereby superseded.

APPENDIX H

FOOTNOTE 16 TO RESPONDENT'S BRIEF TO THE CIRCUIT COURT

Cases such as *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62 (1933) are not to the contrary. Under this line of cases, it has been held that the Commissioner can, in certain rare circumstances, waive the requirement under Section 301.6402-2(b)(1) of the Treasury Regulations on Procedure and Administration (1954 Code) (26 C.F.R.), that before a claim can be advanced by a taxpayer in a refund suit, it must have been fully detailed in the claim for refund. *United States v. Memphis Cotton Oil, supra* at 69-73. The purpose of Section 301.6402-2(b)(1) is merely to notify the Commissioner of the various claims the taxpayer is seeking to assert in his claim for refund. Therefore, where the taxpayer can demonstrate that this goal has been met in some other manner, such as where the Commissioner's investigation of the claim for refund adequately considered the ground under question, the courts have found that there would be no purpose served in enforcing Section 301.6402-2(b)(1). See *United States v. Memphis Cotton Oil, supra.*

The present case is clearly distinguishable. Not only does Section 301.7122-1(d) serve the purpose of notifying the Commissioner and his delegates of the terms of the compromise offer, but it serves the purpose of avoiding any misunderstandings which might arise if oral compromise agreements were allowed. Thus, the regulation seeks to insulate the Commissioner and his delegates from having to spend their time in court litigating the issues of whether a compromise agreement was entered into and, if one was, what the terms of the agreement were. Indeed, in many cases, without the written agreement, the Commissioner would be unable to even learn about the compromise agreement, let alone litigate the above issues--for example, if

the party allegedly making the oral agreement on the Secretary's behalf were to die or become incompetent. As a result, the regulation is necessary so that the Commissioner can keep track of compromise agreements, and their terms, and so that such agreements can be utilized, when necessary, by employees other than those who were actually involved in reaching the compromise agreement.

Supreme Court, U.S.
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No. 87-103

In the Supreme Court of the United States

OCTOBER TERM, 1987

PIERRE BOULEZ, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an informal oral agreement between an IRS official and petitioner was enforceable as a binding compromise despite Treas. Reg. § 301.7122-1(d), which provides that a compromise agreement must be in writing in order to be effective.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 810 F.2d 209. The opinion of the Tax Court (Pet. App. 22a-34a) is reported at 76 T.C. 209.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1987. A petition for rehearing was denied on April 14, 1987 (Pet. App. 38a). The petition for a writ of certiorari was filed on July 13, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a French citizen, is a world-renowned conductor and music director who performed services in the United States during 1971-1974. In 1971, petitioner contracted with Beacon Concerts, Ltd., a British corporation, to serve as that organization's director and as a conductor for other musical organizations selected by Beacon.

Beacon in turn contracted with the New York Philharmonic Orchestra and the Cleveland Orchestra to provide petitioner's services. During 1971 and 1972, Beacon received $207,473 for petitioner's services and, after deducting its expenses and commissions, paid petitioner $188,495. Pet. App. 2a-3a.

Petitioner filed nonresident alien income tax returns for 1971-1974, but he failed to report on those returns any of the income earned as a result of the services contracted for by Beacon. Subsequently, the Internal Revenue Service (IRS) launched an investigation into petitioner's tax obligations, and it directed the New York Philharmonic Orchestra to withhold 30% of future payments made for petitioner's services. Petitioner then retained Irving Moskovitz as counsel. Pet. App. 3a-4a.

Moskovitz negotiated with the IRS concerning petitioner's outstanding tax liabilities and reached an oral agreement with Joseph McGowan, the IRS Director of International Operations.[1] According to the agreement, petitioner would file amended returns for 1973 and 1974 reporting his earnings from the performance of services for Beacon. In exchange, McGowan stated that the IRS would not assess any penalties for late filing or late payment for 1973 and 1974, and that the IRS would not require petitioner to pay $44,459 in income taxes attributable to the income that he received for performing services for Beacon during 1971 and 1972 (taxes that petitioner later conceded were legally due and owing). Petitioner filed amended returns for 1973 and 1974 and paid $53,841 in additional taxes for those years. He appended to these returns a letter from his counsel stating that these returns were "in accordance with [counsel's] conversation with" the Director. The IRS accepted the amended returns and imposed no penalties for 1973 or 1974. Pet. App. 4a.

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[1] The government stipulated to the existence of this oral agreement only for the purpose of enabling the Tax Court to dispose of petitioner's motion for summary judgment.

2. In 1977, the IRS commenced an unrelated audit of petitioner's 1975 return, which later was expanded to an examination of his 1971 and 1972 returns. The IRS subsequently issued a notice of deficiency with respect to petitioner's 1971 and 1972 tax years, asserting that he had improperly excluded from income the amounts received for the services that he performed in the United States. Petitioner sought redetermination of the deficiencies in the Tax Court and moved for summary judgment on two grounds: (1) that the oral agreement with Director McGowan constituted a binding compromise that precluded the imposition of any tax liability for 1971 and 1972; and (2) in any event, that the IRS was equitably estopped from asserting any tax liability with respect to those years, because petitioner had supposedly relied upon the agreement to his detriment. Pet. App. 5a. Petitioner conceded that the deficiency notices were correct and that decision should be entered against him in the event that he did not prevail on his "binding compromise" or "estoppel" theories (*id.* at 25a).

The Tax Court denied petitioner's motion for summary judgment and entered a decision in favor of the Commissioner (Pet. App. 22a-34a). The court pointed out that Treas. Reg. § 301.7122-1(d) requires that compromise agreements be in writing, and that Rev. Proc. 64-44, 1964-2 C.B. 974, establishes compliance with this regulation as a limitation on the delegation of authority to subordinate officials to enter into compromise agreements. The court accordingly held that Director McGowan did not have either actual or apparent authority to enter into a binding oral compromise agreement (Pet. App. 28a-30a). The court also concluded that the Commissioner was not equitably estopped from asserting the deficiencies at issue here, finding that petitioner had not suffered any substantial detriment in reliance on the alleged agreement. In this connection, the court noted that petitioner had the opportunity to file refund claims for 1973 and 1974 after

the IRS allegedly had breached the oral compromise by asserting a tax liability for 1971 and 1972, but that petitioner had not exercised that option. *Id.* at 31a-33a.

The court of appeals unanimously affirmed (Pet. App. 1a-21a). Although petitioner abandoned his "estoppel" argument on appeal (see *id.* at 20a), he reiterated his contention that the applicable regulation was invalid on the theory that Section 7122 of the Code[2] contemplates the existence of a binding oral compromise. The court of appeals rejected this contention, pointing out that Section 7122 itself neither sanctions oral compromises nor specifies that compromise agreements must be in writing. Rather, Congress left to the Secretary of the Treasury the task of promulgating regulations concerning the "requisite manner of offer and acceptance of compromises" (Pet. App. 8a (footnote omitted)). The court of appeals found that the regulation requiring that such compromises be in writing was a reasonable and permissible exercise of the Secretary's authority. *Id.* at 9a-16a. The court of appeals also rejected petitioner's contention that the Director had authority to waive the requirements of the regulation in this case (*id.* at 16a-19a).

ARGUMENT

Petitioner does not deny that the oral agreement here failed to satisfy the requirements of Treas. Reg. § 301.7122-1(d), which requires that compromise agreements must be in writing.[3] He contends, however, that the regulation is invalid and, alternatively, that its require-

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[2] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

[3] Section 301.7122-1 provides in relevant part:

(d) *Procedure with respect to offers in compromise*—(1) *Submission of offers.* Offers in compromise shall be submitted on

ments effectively were waived by Director McGowan. The court of appeals correctly rejected both of these contentions, and its decision does not conflict with any decision of this Court or of another court of appeals. Indeed, petitioner concedes (Pet. 7) that this is a case of "first impression." Accordingly, there is no basis for review by this Court.

1. Petitioner contends (Pet. 9-11) that the requirement of Treas. Reg. § 301.7122-1(d) that compromise agreements be in writing is invalid because Section 7122 of the Code requires that oral agreements be accorded binding effect. This contention is mistaken for reasons well stated by the court of appeals (Pet. App. 9a-16a).

The regulation involved here was promulgated pursuant to the broad authority to issue regulations conferred upon the Secretary by Section 7805 of the Code. Such regulations are valid unless they are found to be unreasonable or plainly inconsistent with the statute. See, *e.g.*, *Commissioner* v. *Portland Cement Co.*, 450 U.S. 156, 169 (1981); *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 476 (1979). Section 7122 provides simply that the Secretary "may compromise" any tax case prior to reference to the Justice Department and that a written record of the compromise generally must be placed in the Secretary's files. Thus, while the statute itself does not address whether or not a compromise agreement must be in writing, the writing requirement set forth in the regulation plainly is not inconsistent with Section 7122.

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forms prescribed by the Internal Revenue Service which may be obtained from district directors of internal revenue, and should generally be accompanied by a remittance representing the amount of the compromise offer or a deposit if the offer provides for future installment payments.

* * * * *

(3) *Acceptance.* An offer in compromise shall be considered accepted only when the proponent thereof is so notified in writing. * * *

Indeed, the regulatory requirement that there be a written agreement is fully in accord with the congressional intent that underlies Section 7122. There is a longstanding congressional policy in favor of formal procedures for settling tax disputes. This Court has recognized that an informal agreement between a subordinate official and a taxpayer is not a binding settlement without the formal and statutorily-required approval of the Secretary of the Treasury, noting that Congress "did not intend to intrust the final settlement of such matters to the informal action of subordinate officials." *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 288-289 (1929). In fact, the legislative history of the earliest predecessors of Section 7122 indicates that Congress contemplated that compromise agreements would have to be made in writing. See Cong. Globe, 40th Cong., 2d Sess. 3775 (1868) ("no compromise can be made except with the written assent of the Secretary of the Treasury") (remarks of Sen. Sherman) and Cong. Globe, 37th Cong., 3d Sess. 906 (1863) ("Where every agreement of that sort is made in writing, * * * it strikes me that there is no great danger about it.") (remarks of Sen. Fessenden), *reprinted in* J. Seidman, *Seidman's Legislative History of Federal Income Tax Laws 1938-1861*, at 1059, 1060 (1938). Thus, there is evidence that Congress intended that compromise agreements should be made in writing in order to have binding effect. In any event, there is no basis for concluding that the regulatory requirement of a written agreement is inconsistent with congressional intent.

Petitioner rests his contrary assertion entirely on a comparison of Section 7122 with Section 7121 of the Code. Because Section 7121, which concerns closing agreements, specifically refers to an "agreement in writing," petitioner maintains that the failure to make a specific reference to written agreements in Section 7122 necessarily shows that Congress intended that oral agreements would be effective under the latter section. This conclusion simply does not

follow. At most, the comparison with Section 7121 indicates that Congress did not *itself* impose a writing requirement for compromise agreements; rather, it "left to the Secretary of the Treasury the task of promulgating regulations addressing the requisite manner of offer and acceptance of compromises" (Pet. App. 8a). The regulation applicable here is a reasonable implementation of the general congressional authorization in Section 7122, and there is no basis for holding it invalid. Because the informal oral agreement invoked by petitioner concededly did not meet the standards set forth in the regulation for a binding agreement, the court of appeals correctly rejected petitioner's attempt to rely on that agreement.[4]

2. Petitioner's contention (Pet. 11-15) that Director McGowan should be held to have "waived" the regulation's writing requirement is similarly without merit. It is clear that the requirement that a compromise agreement be made in writing in order to be binding is not one that can be waived by a subordinate official. The delegation of authority to subordinate IRS officials to compromise tax controversies is quite explicit on this point. Rev. Proc. 64-44, 1964-2 C.B. 974, provides:

> This is a "limited" delegation to the extent that the delegated authority must be exercised in accordance with the limitations prescribed by section 301.7122-1

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[4] Petitioner contends (Pet. 10-11) that, because the court of appeals failed to accept the inference that petitioner seeks to draw from Section 7121, the decision below conflicts with *General Electric Co.* v. *Southern Construction Co.*, 383 F.2d 135, 138 n.4 (5th Cir. 1967), cert. denied, 390 U.S. 955 (1968). This contention is fanciful. *General Electric* involved a completely different statute, and, in any event, the language cited by petitioner is dicta. Indeed, the court of appeals in *General Electric* specifically stated that it was *not* relying upon the mode of statutory construction that petitioner seeks to invoke.

> of the Regulations on Procedure and Administration and with procedures established by the National Office.[5]

Thus, Director McGowan was not authorized to enter into a binding oral compromise agreement, in contravention of the plain terms of Treas. Reg. § 301.7122-1(d), and there was no basis for petitioner to believe that McGowan had such authority.

Petitioner's assertion (Pet. 11) that the writing requirement is merely "directory," and that it can be waived at will by the Commissioner's delegate despite Rev. Proc. 64-44, is completely unsupportable. Petitioner is suggesting that a delegate is free to ignore the limitations imposed upon a delegation of authority to him. If a chain of command is to retain any meaning, it is the superior officer who decides what the authority of his delegate will be, not the other way around.[6]

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[5] For the reasons well stated by the court of appeals (Pet. App. 18a-19a), petitioner clearly errs in asserting (Pet. 14-15) that Rev. Proc. 64-44 was not applicable here because it was "rendered obsolete" by an intervening delegation order. Rev. Proc. 64-44, explicitly incorporating the writing requirement as a limitation on its delegation of authority, remained in full force until it was superseded in 1980 by Rev. Proc. 80-6, 1980-1 C.B. 586, which contained the same limitation.

[6] The cases relied upon by petitioner to support his "waiver" theory (see Pet. 11-13) are completely inapposite. In *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62 (1933), this Court merely held that the Commissioner had to allow a taxpayer to amend a vague refund claim, rather than holding the claim until the time for filing had expired and then denying the claim on the technical ground that is was not sufficiently definite. The Court found that the purpose of the applicable regulation—giving adequate and timely notice to the Commissioner—was satisfied there by the filing of a timely claim with the opportunity to amend if the Commissioner objected to the lack of specificity of the claim. This rationale plainly provides no support for petitioner's effort to frustrate the purpose of the regulatory writing requirement involved in this case. See generally Pet. App. 16a n.53. By the same token, in *Cleveland Trust Co.* v. *United States*, 421 F.2d 475,

3. Petitioner raises two other claims that require only brief discussion. He asserts (Pet. 18-20) that principles of retroactivity do not permit the court of appeals' decision to be applied in this particular case. But there is no question of retroactive application here. Both Treas. Reg. § 301.7122-1(d) and the limited delegation of Rev. Proc. 64-44 were in effect when all the events relevant to this case occurred. Thus, petitioner appears to be contending that a valid regulation can never be applied to a taxpayer until after its validity has been upheld by a court. We are aware of no authority that supports this extravagant proposition.

Petitioner also asserts (Pet. 16-17) that he is entitled to prevail because the Commissioner failed to provide him with certain administrative files—files that petitioner asserts "would contain a written record confirming the oral compromise agreement" (*id.* at 17). But the government conceded for purposes of the summary judgment motion that there was an oral compromise agreement; the discovery of a written record in IRS files confirming the existence of such an oral agreement would not add anything to petitioner's case. Petitioner has never asserted, and does not assert here, that there was a written agreement between the parties that would satisfy the regulatory requirement; hence, he cannot prevail no matter what the IRS files would have revealed.

481-482 (6th Cir.), cert. denied, 400 U.S. 819 (1970), the court of appeals simply held that a Revenue Procedure permitting the Commissioner to set aside an "informal conference agreement" when the agreement was based upon a "clearly defined error" did not require the Commissioner to disclose the nature of the "clearly defined error" to the taxpayer. The case does not purport to hold that revenue procedures are only "directory." Moreover, unlike this case, *Cleveland Trust* did not concern limitations on a delegation of authority and did not involve an attempt by the taxpayer to avoid the effect of an unambiguous Treasury Regulation.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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PIERRE BOULEZ,

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—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF OF PETITIONER PIERRE BOULEZ

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REPLY BRIEF OF PETITIONER PIERRE BOULEZ

ARGUMENT

1. The Commissioner suggests that the Regulation involved here is valid unless found to be "unreasonable or plainly inconsistent with the statute" (Opp. Br. at p. 5).[1] In support of this proposition, the Commissioner cites *Commissioner v. Portland Cement Co.*, 450 U.S. 156 (1981) and *National Muffler Dealers Ass'n. v. United States*, 440 U.S. 472 (1979). Neither of these cases, however, applies on the stipulated facts.

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1 References to "Opp. Br." are to the Commissioner's Brief in Opposition to the Petition, dated September, 1987

In *Portland Cement*, respondent taxpayer did not contend that the treasury regulations there at issue either were unreasonable on their face or inconsistent with the Internal Revenue Code: "To the contrary, [taxpayer] acknowledges that several courts have found the regulations to prescribe a reasonable formula for determining gross income. . . ." *Portland Cement*, 450 U.S. at 170. Nor do the guidelines suggested in *National Muffler Dealers* provide the Commissioner with any assistance in arguing that his interpretation of Treas. Reg. Sec. 301.7122-1 carries out in a proper manner the congressional mandate of I.R.C. Section 7122. In *National Muffler Dealers*, this Court observed that to make such a determination:

> we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it . . . and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.

440 U.S. at 477 (citations omitted).

In the instant case, the plain language of I.R.C. Section 7122(a) omits any requirement of a writing. The Circuit Court has expressly concluded that "[u]n-deniably Section 7122 is facially ambiguous". (Op. at p. 8) After reviewing the available legislative history (including the portions recited in the opposing brief which the Commissioner has submitted to this Court), the Circuit Court concluded that it has found "no

suggestion that Congress, in the course of deliberation, otherwise considered the form that compromise agreements should take. . . ." (Op. at p. 8) Indeed, the Circuit Court expressly observed that the legislative history relied upon by the Commissioner to suggest a requirement of a writing refers to language which was *deleted* from the final draft of the original provision of Section 7122(a) (Op. at p. 7, n. 30 and pp. 7-8.) Where a provision of a bill is deleted by a congressional committee, such action "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Paving Co.*, 419 U.S. 186, 200 (1974).

The Circuit Court already has rejected the Commissioner's reliance upon this Court's decision in *Botany Worsted Mills v. United States*, 278 U.S. 282 (1929) ("*Botany Mills*"). In concluding that the question posed in the instant case is one of "first impression", the Circuit Court reviewed *Botany Mills* and observed that this Court's decision in that case "did not address . . . the validity of oral compromise agreements per se" (Op. at p. 6, n. 28).[2]

The Commissioner observes that Section 7122 provides for a written record of a compromise to be placed in the Secretary's files. Based upon that observation, the Commissioner suggests that "the writing requirement set forth in the regulation plainly is not inconsistent with Section 7122" (Opp. Br. at p.5). The Commissioner's suggestion, however, is not

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2 The Commissioner's quotation from *Botany Mills* confirms that the focus of the Court in that case was the use of informal action by "subordinate officials" to reach a settlement (Opp. Br. at p. 6) and not action by a statutory delegate of the Secretary, such as the Director of International Operations.

relevant to the issue presented: Whether a *mandatory* writing requirement in the Regulation would be inconsistent with Section 7122. The Commissioner has failed to rebut *Hamilton v. United States*, 324 F.2d 960, 965 (Ct. Cl. 1963) in which the Court of Claims expressly confirmed that the sole writing referred to in Section 7122 (appearing in subsection b) is directory in nature. In light of *Hamilton*, to reconcile the Regulation with the Statute, one must conclude that the writing referred to in the Regulation is directory in nature.

The Commissioner asserts that Petitioner is "fanciful" in suggesting that the decision below conflicts with the doctrine of *General Electric Co. v. Southern Constr. Co.*, 383 F.2d 135 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968). The Commissioner observes that *General Electric* involves a statute which is different from that presented to this Court. His distinction, however, ignores the purpose of Petitioner's citation: to show that in a case of "first impression", the Circuit Court has construed the statute at issue in a manner conflicting with fundamental principles of statutory construction which apply in other circuits.

This Court previously has held that conflicts in principle may provide the basis for an important question to be heard on a petition of certiorari to this Court. *See, e.g., Ivan Allen Co. v. United States*, 422 U.S. 617, 623-624 (1975). Petitioner respectfully submits that it is the Commissioner whose response is "fanciful": in a matter of "first impression", conflict between or among the circuits necessarily are conflicts in principle. Were this Court to ignore such conflicts, novel issues rarely, if ever, could be accorded certiorari treatment, regardless of the importance of the question presented -- and we note that the Commissioner does not dispute the importance of the question presented by the instant petition.

The Commissioner suggests that the language in *General Electric* is "dicta" (Opp. Br. 7).[3] Petitioner observes that *General Electric* recites a proposition which is ingrained in the precedent of other circuits. Thus, in *Richerson v. Jones*, 551 F.2d 918 (3d Cir. 1977), the Court explicitly relied upon the observations of the Fifth Circuit in *General Electric* to compare adjacent provisions in a statute to determine the significance of the omission of a provision in one of two sections:

> As observed in *General Electric Co. v. Southern Construction Co.*, 383 F.2d 135, 138 n. 4 (5th Cir. 1967), 'where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed.'

551 F.2d at 928

Thus, even were one to conclude that the language recited above technically was not part of the *General Electric* holding, clearly the identical language is part of the holding in *Richerson*. Accordingly, the holding of the Circuit Court in the instant case is in conflict with the canons of construction applied in the Third Circuit.

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3 The Fifth Circuit chose not to apply the rule of *pari materia* after concluding that the statute itself was free from ambiguity and doubt. 383 F.2d at 138 and n. 3. The Fifth Circuit expressly stated: "We do not mean to imply that our interpretation of Subdivision (b) would be different if it were construed in the light of its legislative history and in *pari materia* with Subdivision (a)." 383 F.2d at 138, n. 4.

2. The Commissioner's opposing brief (at p. 8, n. 6) fails to refute the implicit proposition for which the Commissioner himself cited *United States v. Memphis Cotton Oil Company*, 288 U.S. 62 (1933) to the Circuit Court (see Appendix H to Petition at pp. 61a-62a) and fails to refute the explicit proposition for which *Memphis Cotton* is cited in the Petition (at p. 12): Part 301 Regulations are directory and not mandatory. Regarding *Cleveland Trust Co. v. United States*, 421 F.2d 475 (6th Cir.), *cert denied.*, 400 U.S. 819 (1970), the Circuit Court expressly found that "the above quoted Revenue Procedure is directory and not mandatory." *Id.* at 481.

3. The Commissioner does not address *Chevron Oil v. Huson*, 404 U.S. 97, 106-107 (1971). In focusing solely upon the Regulations (Opp. Br. at p. 9), the Commissioner ignores the central role of I.R.C. Section 7122 in this litigation, as well as the express finding of the Circuit Court that the issue presented is one of "first impression" (Op. at p. 6) requiring interpretation of an "ambiguous" section of the Internal Revenue Code (Op. at p. 7). As such, the instant case falls squarely within the *Chevron* bar of retroactive application of "an issue of first impression whose resolution was not clearly foreshadowed." *Chevron*, 404 U.S. at 106-107.

CONCLUSION

For the foregoing reasons, and for the further reasons set forth in the Petition, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Dated: October 5, 1987

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